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In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in the absence of exhaustion of administrative remedies, the district court had jurisdiction under 42 U.S.C. (Supp. V) 405(g), 28 U.S.C. (Supp. V) 1331, or 28 U.S.C. 1361 over this action challenging the standards and procedures applied by the Secretary of Health and Human Services and state officials to determine whether an individual continues to be eligible for disability benefits under Title II or Title XVI of the Social Security Act.

PARTIES TO THE PROCEEDING

The petitioners are Margaret M. Heckler, Secretary of Health and Human Services; Martha A. McSteen, Acting Commissioner of Social Security; Barry Stern, Secretary of the Pennsylvania Department of Labor and Industry; and John Delpaine, Director of the Pennsylvania Disability Determination Bureau.

The named respondents are Frank Kuehner, Dorothy Burayak, Richard Burns, Alice Hetherington, Frank Jennings, Jr., Philip Fisher, Clinton Royal, Solomon Katz, Raymond Staniewicz, James N. McKeown, James Loughlin, Margaret Douglas, Lawrence Cook, Steven Sverdlow, Elaine Fleigelman, and Riva Yanovskaya. The named respondents are representatives of a class consisting of "all Pennsylvania Social Security Disability Insurance and Supplemental Security Income disability beneficiaries whose benefits have been terminated or are threatened with termination and who have presented claims for continued disability" (C.A. App. 40).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, the Commissioner of Social Security, the Secretary of the Pennsylvania Department of Labor and Industry, and the Director of the Pennsylvania Disability Determination Bureau, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 717 F.2d 813. The opinion of the district court (App., *infra*, 39a-45a) is reported at 547 F. Supp. 49.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 35a-36a) was entered on September 19, 1983, and a petition for rehearing was denied on November 28, 1983 (App., *infra*, 37a-38a). On February 21, 1984, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. (Supp. V) 1331, 28 U.S.C. 1361, relevant provisions of the Social Security Act, and 20 C.F.R. 416.903 are reproduced at App., *infra*, 46a-56a.

STATEMENT

A. The Statutory and Regulatory Framework

Titles II and XVI of the Social Security Act provide for the payment of disability benefits to a person who, because of a physical or mental impairment that has lasted or can be expected to last for a continuous period of not less than 12 months, is unable to do his previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B). An individual who is found to be disabled thereafter may continue to receive benefits only for as long as his status—medical and otherwise—continues to satisfy the statutory definition of disability. 42 U.S.C. (& Supp. V) 423(a)(1), 425; 20 C.F.R. 404.1594, 404.1597. Accordingly, Congress has provided for the Secretary, at least once every three years, to review the cases of individuals who previously were found to be disabled under Title II in

order to ascertain whether they continue to be eligible for benefits. 42 U.S.C. (Supp. V) 421(h). The Secretary has provided for a parallel program of periodic review under the Title XVI Supplemental Security Income (SSI) program. When the individual's case is reviewed, he bears the burden of showing that he continues to have a physical or mental impairment of sufficient severity to satisfy the statutory standard of disability. *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

The initial determination whether a person receiving benefits is still disabled ordinarily is made by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. (& Supp. V) 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903. The state agency first notifies the individual that his case has been selected for review and inquires about his current medical condition and the identity of his treating physician or medical facility. 20 C.F.R. 404.1593, 416.993. If the state agency then makes a tentative determination that the disability has ceased, the individual is given an advance written notice and explanation and is informed that he has 10 days within which to submit any additional information. 20 C.F.R. 404.1594-404.1595, 416.994. After this 10-day period and the receipt of any further evidence, the state agency makes its initial determination. See *Mathews* v. *Eldridge*, 424 U.S. at 337-338. Some state agency determinations in turn are subject to review by the Social Security Administration (SSA) prior to their effectuation, in order to ensure the quality and uniformity of state decisions and compliance with governing procedures. See 42 U.S.C. (Supp. V) 421(c).

If an individual receiving disability benefits under Title XVI of the Act is dissatisfied with the initial determination, the next step in the administrative process is the statutorily mandated opportunity for an evidentiary hearing before an administrative law judge (ALJ) in SSA. 42 U.S.C. (Supp. V) 1383(c)(1); 20 C.F.R. 416.1407, 416.1429-416.1465. Because entitlement to SSI benefits, unlike Title II benefits, is based on need (42 U.S.C. 1382(a)), the Secretary has implemented this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), by providing that the actual payment of benefits will not be terminated until after the ALJ has rendered his decision following the hearing. 20 C.F.R. 416.1336(b).

If an individual receiving disability benefits under Title II is dissatisfied with the initial determination, he must request reconsideration of that determination before obtaining an ALJ hearing. 20 C.F.R. 404.907-404.921. Under amendments to the Act effective on January 1, 1984, the individual must be afforded an opportunity for a face-to-face evidentiary hearing at this reconsideration stage. Pub. L. No. 97-455, § 4, 96 Stat. 2499, to be codified at 42 U.S.C. 405(b)(2). If the decision on reconsideration is adverse to the claimant, he then is entitled to an ALJ hearing. 42 U.S.C. (Supp. V) 421(d), 405(b); 20 C.F.R. 404.944-404.965. Congress enacted temporary legislation in 1982 permitting the claimant in a Title II disability cessation case to elect to receive interim benefits pending receipt of the ALJ's decision, subject to recoupment if the determination that his disability ceased is affirmed.[1]

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[1] Pub. L. No. 97-455, § 2, 96 Stat. 2498, to be codified at 42 U.S.C. 423(g). The temporary authorization (as briefly extend-

If the decision by the ALJ after a hearing is adverse, the Title II or Title XVI claimant may seek review by the Appeals Council in SSA. 20 C.F.R. 404.967-404.983, 416.1467-416.1483. In addition, in Section 304(g) of the Social Security Disability Amendments of 1980 (94 Stat. 456), Congress directed the Secretary to institute a program for the Appeals Council to review some ALJ decisions on its own motion, in order to ensure accuracy and uniformity among ALJ decisions. Only after the Appeals Council has either denied review of the ALJ's decision or has granted review and rendered a decision is the Secretary deemed to have rendered her "final decision" or "final determination" on the claim, which is then subject to judicial review in federal district court pursuant to 42 U.S.C. (Supp. V) 405(g). See 42 U.S.C. (& Supp. V) 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481.

B. The Proceedings In This Case

1. This class action was filed in the United States District Court for the Eastern District of Pennsylvania on April 29, 1982 against the Secretary of Health and Human Services and the Commissioner of Social Security, as well as the state officials responsible for administering the Social Security disability programs in Pennsylvania on the Secretary's behalf (C.A. App. 4).[2] The

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ed by Pub. L. No. 98-118, § 2, 97 Stat. 803) applies to any case in which the initial determination that the disability had ceased was made on or after (or was pending on administrative review on) the effective date of the Act (January 12, 1983), but before December 7, 1983. HHS may continue to pay benefits in such cases through June 1984 or until the ALJ renders his decision, whichever occurs first.

[2] "C.A. App." refers to the Appendix filed in the court of appeals.

plaintiffs alleged in their amended complaint (C.A. App. 1-29) filed on June 25, 1982 that the standards and procedures utilized by the defendants for determining whether an individual's disability has ceased violate the Social Security Act and the Due Process Clause of the Constitution. Specifically, the plaintiffs alleged as such violations: (1) that the defendants fail to show, as a condition to terminating benefits, that the claimant's medical condition has improved; (2) that the defendants fail to give presumptive effect to the prior determination of disability when they review a claimant's continuing eligibility; (3) that the defendants terminate benefits in the absence of fully developed medical evidence from all treating medical personnel and without giving appropriate weight to such evidence; and (4) that the defendants terminate benefits "without observing the sequential disability evaluation process by considering such factors as medical equivalence, combination of impairments, pain, and residual functional capacity" (C.A. App. 25-26; App., *infra*, 39a-40a). Jurisdiction was alleged to rest on 42 U.S.C. (Supp. V) 405(g), 42 U.S.C. 1383(c)(3), 28 U.S.C. (Supp. V) 1331, and 28 U.S.C. 1361 insofar as the case was brought against the federal defendants, and on 28 U.S.C. (Supp. V) 1343 and pendent jurisdiction as against the state defendants (C.A. App. 3).

The district court certified a class of plaintiffs consisting of all disability beneficiaries under Title II and Title XVI of the Act in Pennsylvania "whose benefits have been terminated or are threatened with termination and who have presented claims for continued disability" (C.A. App. 40). The complaint alleged that there were 102,676 SSI disability beneficiaries and 158,565 Title II disability beneficiaries in Pennsylvania as of January

1982 whose cases were (or soon would be) subject to review and who therefore were potential class members (C.A. App. 5). There was no allegation, however, that these unnamed class members actually had received an initial determination that their disabilities had ceased or that they had exhausted their administrative remedies by seeking reconsideration, an ALJ hearing, and Appeals Council review. Moreover, none of the named plaintiffs who are still active members of the class had exhausted his administrative remedies, and in many instances the named plaintiffs had not even completed the reconsideration stage.[3]

2. The district court dismissed the complaint for lack of subject matter jurisdiction. The court first held that jurisdiction did not lie under 42 U.S.C. (Supp. V) 405(g)

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[3] See C.A. App. 7-22, ¶¶ 22, 28, 35, 42, 46, 51, 69, 74, 80, 82, 94, 98, 104, 112, 115. An affidavit of an SSA official, which was based upon SSA's search of the individual claimants' records and was included in a Supplemental Appendix filed in the court of appeals (Supp. C.A. App.), confirmed that these named plaintiffs had not exhausted their administrative remedies, although the files of several named plaintiffs could not be located (see Supp. C.A. App. 6 ¶ 10, 9 ¶ 16). One of the original named plaintiffs, Clinton Royal, had exhausted his administrative remedies and had sought judicial review in an individual action under 42 U.S.C. (Supp. V) 405(g) in the United States District Court for the Eastern District of Pennsylvania (No. 81-4747) before this class action was filed (C.A. App. 14 ¶ 59). Final judgment in Royal's individual action was entered in favor of the Secretary on March 31, 1983, and no appeal was taken from that judgment. The decision terminating his benefits therefore became final and binding upon him. 42 U.S.C. 405(h). Although Royal was a named party in the court of appeals in this class action as well and therefore is a named respondent before this Court, he cannot be considered still to be an active member of the respondent class, much less a suitable class representative.

because the plaintiffs had failed to exhaust "their available and adequate administrative remedies" (App., *infra*, 40a). The court explained that under this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 765-777 (1975), the "final decision" requirement is central to the grant of subject matter jurisdiction under 42 U.S.C. (Supp. V) 405(g) and that the Secretary must determine what constitutes a "final decision" for these purposes. Here, the court noted, the Secretary had declined to waive the exhaustion requirement because respondents' claims raised both factual and legal issues for which further administrative review would be appropriate. App., *infra*, 40a-41a.

The district court also concluded that it could not excuse exhaustion and find jurisdiction under 42 U.S.C. (Supp. V) 405(g) on the theory that the issues respondents sought to raise are "collateral" to their substantive claims for benefits within the meaning of the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, 424 U.S. at 330-332. In the court's view, respondents' statutory contentions "consist of a grievance respecting the benefits due" and are "directed at upsetting the merits of the Secretary's determination," and their constitutional claims are "inextricably intertwined" with these statutory contentions (App., *infra*, 43a).

The district court concluded that other bases of jurisdiction were foreclosed as well. It explained that the special statutory procedure for judicial review under 42 U.S.C. (Supp. V) 405(g) is "exclusive and cannot be circumvented by resort to the general jurisdiction of the district courts" under 28 U.S.C. (Supp. V) 1331 to entertain actions "seeking broad injunctive and declaratory relief" (App., *infra*, 44a). The "extraordinary" rem-

edy of mandamus under 28 U.S.C. 1361 also was not available, the court concluded, because respondents "have other ample and available means by which to have their claims reviewed, such as the administrative procedures of an Administrative Law Judge hearing and an Appeals Council review, and such as judicial review pursuant to [42 U.S.C. (Supp. V)] 405(g) with the benefit of an administrative record" (App., *infra*, 44a-45a). Finally, the court held that it did not have jurisdiction under 28 U.S.C. (Supp. V) 1343 insofar as respondents sought relief against the state defendants, because those defendants' actions in administering the Social Security Act are taken "under color of federal law as mere agents of the Secretary," not under color of state law (App., *infra*, 45a).

3. The court of appeals reversed the district court's dismissal of the case for lack of jurisdiction and remanded for further proceedings (App., *infra*, 1a-34a). The court held that despite respondents' conceded failure to exhaust their administrative remedies, the district court had jurisdiction under 42 U.S.C. (Supp. V) 405(g) insofar as the action was brought against the Secretary and Commissioner of Social Security. Citing *Weinberger* v. *Salfi*, the court was of the view that "[t]here is no § 405(g) exhaustion requirement for constitutional issues" (App., *infra*, 8a-9a). Moreover, the court concluded that immediate judicial review is available under 42 U.S.C. (Supp. V) 405(g) to consider a statutory issue, even though the claimant has not exhausted his administrative remedies with respect to his claim for benefits, if the Secretary has taken a " 'final position' " on the particular issue (App., *infra*, 8a-9a, quoting *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 345-346 (3d Cir. 1977)).

Here, the court of appeals observed, respondents presented both constitutional and statutory issues with respect to which the Secretary allegedly had taken "fixed" or "final" positions (App., *infra*, 9a). The court concluded that the latter allegation must be accepted as true for purposes of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction and that respondents must be afforded an opportunity to prove at trial that the Secretary in fact has taken such "fixed" positions (App., *infra*, 9a-10a). In addition, the court held that the district court had mandamus jurisdiction under 28 U.S.C. 1361 to order class-wide relief against the federal defendants, notwithstanding the preclusion of review in 42 U.S.C. 405(h) (App., *infra*, 11a-12a).

Finally, the court of appeals found jurisdiction under 28 U.S.C. (Supp. V) 1331 insofar as the action was brought against the state defendants, even though respondents had alleged such jurisdiction only under 28 U.S.C. (Supp. V) 1343 (App., *infra*, 5a-7a). The court acknowledged this Court's holding in *Weinberger* v. *Salfi* that 42 U.S.C. 405(h) bars the exercise of jurisdiction under 28 U.S.C. (Supp. V) 1331, but it concluded that *Salfi* is "not controlling" here (App., *infra*, 6a). The court reasoned that 42 U.S.C. 405(h) refers only to actions "against the United States, the Secretary, or any officer or employee thereof," and therefore is not a limitation of jurisdiction over a suit against state officials in connection with the adjudication of claims arising under the Social Security Act (App., *infra*, 6a).[4]

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[4] Judge Becker issued a separate concurring opinion (App., *infra*, 14a-34a). Judge Becker concluded that jurisdiction over the action against the state defendants under 28 U.S.C. (Supp. V) 1331 was barred by 42 U.S.C. 405(h) because they are mere agents or alter egos of the Secretary in administering the Social Security disability programs (App., *infra*, 14a-16a), but he found that the district court could exercise mandamus jurisdiction against the state defendants under 28 U.S.C. 1361 (App.,

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is flatly inconsistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and subsequent cases and squarely conflicts with the Second Circuit's jurisdictional rulings in an essentially identical case. *Smith* v. *Schweiker*, 709 F.2d 777 (1983). The court of appeals' wholesale abandonment of the statutory exhaustion requirement in this class action involving potentially scores of thousands of individuals whose claims for benefits are still pending on administrative review threatens substantially to disrupt the orderly administrative and judicial review of claims for benefits under the massive Social Security disability programs. See also *Heckler* v. *Lopez*, No. 83-6126 (9th Cir. Feb. 22, 1984), application for stay pending, No. A-707.[5] Review therefore is plainly warranted.

The Court heard argument on February 27, 1984 in *Heckler* v. *Ringer*, No. 82-1772, which arises under the

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infra, 27a-34a). Judge Becker agreed with the majority that the district court had jurisdiction over the action against the federal defendants under 42 U.S.C. (Supp. V) 405(g) in the particular circumstances of this case (App., *infra*, 16a-27a), despite what he characterized as the Secretary's "forceful arguments" that respondents' contentions "are inextricably intertwined with the merits of each disability-benefits termination decision" and thus are not collateral to their claims for benefits (*id.* at 22a-23a (footnote omitted)).

[5] See also *Mental Health Ass'n of Minnesota* v. *Heckler*, 720 F.2d 965 (8th Cir. 1983); *City of New York* v. *Heckler*, Civ. No. CV-83-0457 (E.D.N.Y. Jan. 1, 1984), appeal pending, No. 84-6037 (2d Cir.); *Trujillo* v. *Heckler*, Civil No. 82-k-1505 (D. Colo. Dec. 15, 1983), appeal pending, Nos. 83-2413 & 84-1181 (10th Cir.); *Hyatt* v *Heckler*, No. C-C-83-655-17 (W.D.N.C. Feb. 14, 1984); *Doc* v. *Heckler*, Civ. No. M-83-2218 (D. Md. Dec. 13, 1983), appeal pending, No. 84-1202 (4th Cir.); *Graham* v. *Heckler*, 573 F. Supp. 1573 (N.D. W. Va. 1983).

Medicare title of the Social Security Act but which presents closely related questions of jurisdiction and exhaustion of administrative remedies. The Court therefore may wish to hold the petition in this case and dispose of it in light of the decision in *Ringer*. We will address here several additional matters pertaining to the disability programs and the decision below that are not directly raised in *Ringer*.

1. Immediately after 42 U.S.C. 405 was enacted in 1939, the Social Security Board promulgated regulations making clear that judicial review could be obtained under 42 U.S.C. 405(g) only after the Appeals Council had either denied review or granted review and rendered its decision. 5 Fed. Reg. 4169, 4171-4174 (1940) (adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*) and 403.710(e)). See Gov't Reply Br. 5-6, *Heckler* v. *Ringer*, No. 82-1772. Those requirements remained in effect when Congress established the disability program under Title II in 1954 and 1956[6] and the SSI program under Title XVI in 1972.[7] Against the background of this longstanding administrative implementation of Section 405, Congress's explicit specification in Title II and Title XVI that judicial review of the Secretary's "final decision" or "final determination" on a claim for disability benefits would be available in the manner "provided in section 405(g)" (42 U.S.C. 421(d), 1383(c)(3)) constitutes a congressional ratification of the exhaustion requirement in the then-existing regulations

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[6] Social Security Amendments of 1954, ch. 1206, § 106, 68 Stat. 1079; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. See 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*) and 403.710(e) (1954 & 1956).

[7] Social Security Amendments of 1972, Pub. L. No. 92-603, Tit. III, 86 Stat. 1465 *et seq*. See 20 C.F.R. 404.908, 404.916, 404.940, 404.951 (1972).

and an expression of congressional intent that the same prerequisite to judicial review apply under the SSI and Title II disability programs. See *Haig* v. *Agee*, 453 U.S. 280, 297-299 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

In addition, from 1975 to the present day, Congress repeatedly has examined the four-stage process for administrative review of disability claims (see Gov't Br. 3-6, 23-31, *Heckler* v. *Day*, No. 82-1371 (argued Dec. 5, 1983)) without altering the exhaustion requirements in the Secretary's regulations. *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 25. Significantly, moreover, Congress's intensive concern with these matters has been concentrated in the years following this Court's decision in *Salfi*, which held that a court may not excuse the exhaustion of administrative remedies required by the Secretary's regulations based on its own finding of futility (422 U.S.C. at 764-767), and also following this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which reaffirmed the *Salfi* holding in the specific context of the termination of disability benefits and recognized only a narrow exception to the exhaustion requirement for an "entirely collateral" issue that otherwise would be effectively unreviewable and unremediable (424 U.S. at 330-332). Although Congress has amended the procedures for review of disability claims under Title II and Title XVI in a number of other respects, it has not chosen to alter the exhaustion and jurisdictional rules established by *Salfi* and *Eldridge*.

For example, as a result of its continuing review, Congress extensively revised the disability programs in 1980 and 1982 to require such measures as: extensive

regulation by the Secretary of the States' processing of claims for benefits, periodic continuing disability reviews under Title II, a more complete explanation of an initial denial of benefits by a state agency,[8] mandatory review by SSA of determinations by state agencies, an opportunity for a face-to-face evidentiary hearing at the reconsideration stage of Title II disability cessation cases, temporary authorization for the payment of interim benefits in Title II disability cessation cases pending the ALJ's decision, review of some ALJ decisions by the Appeals Council on its own motion to ensure adequate and uniform adjudication, and limitations on the remand of cases pending on judicial review under 42 U.S.C. 405(g).[9] See pages 2-5, *supra*. It is simply inconceivable that Congress intended that the multi-stage process for the administrative and judicial review of disability claims that these measures were designed to strengthen could be circumvented in the manner countenanced by the court of appeals in this case. Indeed, the text of the amendments demonstrates that Congress intended no such departure.

The statutory revisions in the disability programs discussed above specifically included amendments to 42 U.S.C. 405(b) and 1383(c)(1), which establish the ALJ hearing as an essential step in the review of claims for benefits; an amendment to 42 U.S.C. 405(g), which permits judicial review only of the Secretary's final decision after that hearing; and an amendment to 42 U.S.C.

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[8] See the second sentence of 42 U.S.C. (Supp. V) 405(b) and 1383(c)(1).

[9] 42 U.S.C. (Supp. V) 405(g), as amended by Section 307 of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 458.

421(d), which provides for administrative hearings on Title II disability claims to be conducted pursuant to 42 U.S.C. 405(b) and for judicial review to be available pursuant to 42 U.S.C. 405(g).[10] Congress's amendment of the controlling statutory sections in other respects—while leaving untouched those portions that on their face and as construed by this Court require full exhaustion of administrative remedies as a prerequisite to judicial review under 42 U.S.C. 405(g)—manifests an intent to retain the latter requirements. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-379 (1982).[11]

2. The particular rationale of the court below for excusing exhaustion of administrative remedies as a prerequisite to jurisdiction under 42 U.S.C. (Supp. V) 405(g) warrants only a brief response. The court first held, citing *Weinberger* v. *Salfi*, that "[t]here is no

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[10] See Sections 304(d), 305 and 307 of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 456, 457 and 458; Pub. L. No. 97-455, § 4, 96 Stat. 2499, to be codified at 42 U.S.C. 405(b)(2).

[11] Moreover, under the SSI program, an individual's disability benefits are not terminated until after he has had an ALJ hearing and the ALJ renders a decision that his disability has ceased. See page 4, *supra*. All that remains at that point is the requirement that the claimant seek review by the Appeals Council prior to filing an action under 42 U.S.C. (Supp. V) 405(g). This would not ordinarily be a time-consuming step. There is no permanent authorization under Title II for the payment of interim benefits pending the ALJ's decision. But Congress in the past has enacted temporary legislation providing for the payment of such benefits (see page 4, *supra*), and in doing so has demonstrated how it believes any problems resulting from delay in exhaustion of administrative remedies should be addressed. Congress has not authorized a circumvention of these remedies, as the court of appeals has done.

§ 405(g) exhaustion requirement for constitutional issues" (App., *infra*, 8a-9a). But *Salfi* in fact stands for the opposite proposition: the Court there explicitly held that the district court could *not* dispense with the exhaustion requirement on the ground of futility simply because the plaintiff raised a constitutional challenge to a provision of the Social Security Act. 422 U.S. at 766-767. Contrary to the apparent view of the court of appeals (App., *infra*, 8a), the Court did not retreat from this holding in *Mathews* v. *Eldridge*. The Court in *Eldridge* simply permitted interlocutory judicial review on an issue that was "entirely collateral" to the substantive claim for benefits and that could not be adequately reviewed and remedied in subsequent proceedings. 424 U.S. at 330-332. By contrast, respondents' evidentiary contentions in this case are not even remotely "collateral" to their substantive claims for benefits; those contentions can be adequately considered on judicial review of the Secretary's "final decision" disposing of the entire claim for benefits; and any error can be adequately remedied by means of a retroactive award of benefits. See *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983) (Rehnquist, Circuit Justice), slip op. 9; *Smith* v. *Schweiker*, 709 F.2d 777, 780-781 (2d Cir. 1983).

Equally without merit is the court of appeals' conclusion that a claimant may obtain interlocutory judicial review on a statutory issue if the Secretary has taken a "final position" on that particular issue (App., *infra*, 8a-9a). The authorization for review of a "final decision" in 42 U.S.C. (Supp. V) 405(g), like that in 28 U.S.C. 1291, permits review only of a final judgment terminating the litigation, except in the narrow category of otherwise unreviewable "collateral" issues.

Mathews v. *Eldridge*, 424 U.S. at 330-332. See Gov't Reply Br. at 3-5, 9-16, *Heckler* v. *Ringer*. What is more, the court of appeals held that respondents' allegations that the Secretary had taken "fixed" positions on the issues they sought to litigate must be accepted as true for purposes of ruling on the Secretary's motion to dismiss for lack of jurisdiction (App., *infra*, 3a-9a, 10a). The court therefore apparently contemplates a trial on remand not only on the merits of the "issues" involved, but also on the threshold question of whether the Secretary harbors "fixed" views on them. This approach is totally at odds with the statutory exhaustion requirement. When the Secretary ultimately renders her "final decision" on a claim for benefits, that decision necessarily will embody her final position, as applied to the individual claim, on any issue that plays a role in her disposition of the claim. Her decision then will be supported by an administrative record adequate for purposes of judicial review. Only in that concrete setting may a court review the Secretary's "position" on a particular "issue."

3. The court of appeals also plainly erred in finding jurisdiction over the action against the state officials under 28 U.S.C. (Supp. V) 1331, despite the bar in the third sentence of 42 U.S.C. 405(h) to the exercise of jurisdiction under Section 1331 (App., *infra*, 5a-7a). Although the third sentence of Section 405(h) in terms refers only to actions "against the United States, the Secretary, or any officer or employee thereof," a claimant cannot resort to a suit against state officials to circumvent the manifest congressional purpose to channel all challenges to decisions denying a claim for benefits through Section 405(g). See *Ellis* v. *Blum*, 643 F.2d 68, 76 (2d Cir. 1981).

Certainly the statutory text does not warrant the recognition of such a substantial loophole. State officials act as the Secretary's agents in adjudicating claims for benefits; they perform these functions under standards prescribed by the Secretary (42 U.S.C. (Supp. V) 421(a)), and their expenses are paid by federal funds (42 U.S.C. (& Supp. V) 421(e), 1383b). Compare *Schweiker* v. *McClure*, 456 U.S. 188, 190-191, 196-197 (1982). The Secretary therefore is the real party in interest in any litigation concerning claims for disability benefits; indeed, the regulations governing the States' determinations of disability expressly provide that "[t]he State agency will not be responsible for defending in court any determination made, or any procedure for making determinations, under these regulations" (20 C.F.R. 404.1615(f)). Compare *United States* v. *Erika, Inc.*, 456 U.S. 201, 205-206 n.4 (1982). Accordingly, for purposes of the third sentence of Section 405(h), the responsible state officials stand in the shoes of the federal "officer[s]" and "employee[s]" who are expressly mentioned in that sentence.

Moreover, the second sentence of Section 405(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in 42 U.S.C. 405(g). Under the statutory scheme, the findings and decisions of the state agency on disability claims are those of the Secretary, and in fact it is SSA, not the state agency, that formally renders the decision to the claimant after it receives and conducts any necessary review of the state agency's proposed disposition. See *Mathews* v. *Eldridge*, 424 U.S. at 338. Section

405(h) therefore applies equally to bar suits under 28 U.S.C. (Supp. V) 1331 against state officials.

CONCLUSION

The Court may wish to hold the petition in this case and dispose of it in light of its decision in *Heckler* v. *Ringer*, No. 82-1772, if that decision sufficiently addresses the issues presented here. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1984

APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

No. 82-1514

FRANK KUEHNER, DOROTHY BURAYAK, RICHARD BURNS, ALICE HETHERINGTON, FRANK JENNINGS, JR., PHILIP FISHER, CLINTON ROYAL, SOLOMON KATZ, RAYMOND STANIEWICZ, JAMES N. MCKEOWN, JAMES LOUGHLIN, MARGARET DOUGLAS, LAWRENCE COOK, STEVEN SVERDLOW, ELAINE FLEIGELMAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JAMES MCKEOWN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS,

v.

RICHARD SCHWEIKER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, BARRY STERN, SECRETARY, PA. DEPT. OF LABOR & INDUSTRY, JOHN DELPAINE, DIRECTOR, PA. DISABILITY DETERMINATION BUREAU.

Argued June 1, 1983.
Decided Sept. 19, 1983.

OPINION OF THE COURT

Before GIBBONS and BECKER, Circuit Judges, and WEBER, District Judge.*

GIBBONS, Circuit Judge.

*Hon. Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The plaintiffs, former recipients of Social Security disability benefits, appeal from an order dismissing their class action complaint for lack of subject matter jurisdiction. The defendants are Richard Schweiker, Secretary of Health and Human Services, John A. Svahn, Commissioner, Social Security Administration (the federal defendants), Barry Stern, Secretary, Pennsylvania Department of Labor and Industry, and John Delpaine, Director, Pennsylvania Disability Determination Bureau (the state defendants). The defendants administer Titles II and XV of the Social Security Act. 42 U.S.C. § 401 et seq. (Supp. V 1981). The Complaint challenges methods employed by the defendants in determining that disability payments should be terminated. In that process the state defendants participate on behalf of the Social Security Administration, and their actions are subject to review by that Administration. We hold that the trial court, 547 F.Supp. 49, erred in dismissing the complaint for lack of jurisdiction, and we reverse.

I

Each of the sixteen named plaintiffs is a former recipient of disability benefits who has been notified that those benefits have been or are about to be terminated, and each has presented a claim to a state or federal agency for continued benefits. The complaint alleges that, motivated by the goal of reducing disability benefits payments for the fiscal year 1982 and thereafter, the federal defendants adopted policies, implemented by the state defendants, which have resulted in high volume review of continued eligibility. It alleges further that the high volume review process has or will

soon affect over 250,000 class members in Pennsylvania who have previously properly been determined to be eligible for such benefits. It alleges, moreover, that the high volume review process which the defendants have implemented (1) fails to ascertain whether there has been any substantial medical improvement in the disabled person's disabling condition, (2) fails to give any presumptive effect to the prior disability determination, (3) results in cessation of disability benefits despite lack of medical evidence in the record justifying that action, (4) ignores or fails to weigh treating physician evidence, and (5) ignores vocational factors, the effects of combined impairments, and the effects of disabling pain. These defects are alleged to be fixed policies applicable to all disability benefit recipients. The complaint alleges, further, that many of the class members suffer from mental illness or disabilities which make it unlikely that they will appreciate the steps which they may have to take to obtain review of initial termination decisions, that many others will be subject to medical risk by the termination of treatment resulting from termination of medicare benefits, and that most class members rely on their disability payments for the necessities of life. These and similar allegations are relied upon as likely to cause immediate and irreparable harm. The complaint charges that the high volume review process involving the five deficiencies alleged is illegal in several respects. These fixed policies are said to violate the Social Security Act, as interpreted by this court, and to deprive class members of benefits to which they are entitled without due process of law. For purposes of a Rule 12(b)(1) motion we must assume that the factual allegations are true.

For relief the plaintiffs seek a declaratory judgment that defendants are erroneously and illegally terminating or threatening to terminate class members receipt of disability benefits by failing:

a. to determine whether substantial medical improvement has occurred;
b. to allow presumptive effect to prior determinations of disability;
c. to develop fully and to accord appropriate weight to evidence from treating physicians; and
d. to follow a proper sequential disability evaluation process, including consideration of medical evidence, combination of impairments, pain, and residual functional capacity.

Injunctive relief against such illegality is sought as well.

II

The Social Security Administration does not before this court contend that the fixed policies alleged in the complaint are consistent with interpretations of the Social Security Act made by this court and others. Indeed at oral argument the Justice Department attorney appearing for the defendants conceded that the Social Security Administration pursues, with respect to certain rulings by courts of appeals, a policy of nonacquiescence. The Social Security Administration has, for example, adopted such a policy with respect to an April 16, 1981 decision of the United States Court of Appeals for the Ninth Circuit holding that disability benefits could not be terminated unless it showed that there was a material improvement in the claimant's medical condi-

tion. Memorandum of February 23, 1982 From Associate Commissioner Office of Hearings and Appeals to all Components of the Social Security Administration. 43a. The Social Security Administration does contend that by virtue of 42 U.S.C. § 405(h) (1976) the district court lacks subject matter jurisdiction to consider its policies either in a suit against the federal defendants or in a suit against the state defendants. And, implicitly at least, the defendants contend that 42 U.S.C. § 405(g) (1976) controls even with respect to challenges to fixed agency policies which violate due process.

III

The district court held that it lacked subject matter jurisdiction to entertain the complaint against either the state or the federal defendants.

A. The State Defendants

The complaint alleges jurisdiction over the state defendants by virtue of 28 U.S.C. § 1343(a)(3) (Supp. V 1981) because of constitutional violations. The court ruled that because the state defendants were administering a federal program they were acting under color of federal law, and thus that there was no jurisdiction under that statute. The court's observation is arguably correct, but irrelevant. Reading the complaint as charging that state officers, acting under color of federal law, deprived the class members of property interests to which the Social Security Act entitled them, either in violation of the due process clause or in violation of the Social Security Act, states a claim arising under the Constitution or laws of the United States. As the trial court construed the complaint against the state officers, therefore, there was jurisdiction to consider it without

regard to jurisdictional amount. 28 U.S.C. § 1331 (Supp. V 1981). Moreover, *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), holding that 42 U.S.C. § 405(h) eliminates section 1331 jurisdiction over suits against the Social Security Administration to recover on any claim arising under the Social Security Act, is not controlling. Section 405(h) refers only to actions against "the United States, the Secretary, or any officer or employee thereof." It cannot be construed as a limitation of state court jurisdiction over suits against state officers, or as a limitation of the general jurisdictional grant in section 1331 except as specified.

We recognize that the jurisdictional reference in the complaint, while mentioning section 1331, relied specifically on 28 U.S.C. § 1343 (Supp. V 1981) for jurisdiction over the state defendants.[1] However, the complaint, as construed by the district court, alleges claims against state officers arising under the Constitution and laws of the United States, and we are instructed by 28 U.S.C. § 1653 (1976) that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The Justice Department is appearing for all defendants, and we can conceive of no prejudice to the state defendants from looking to the allegations of the complaint in order to determine subject matter jurisdiction. *See Ellis v. Blum*, 643 F.2d 68, 75-76 (2d Cir.1981) (Section 1331 provides basis for jurisdiction

[1] Since the elimination of jurisdictional amount in 28 U.S.C. § 1331 the jurisdictional grant in 28 U.S.C. § 1343 appears to have little practical utility.

over state defendants in Social Security Act litigation even though not pleaded).

Thus we hold that the court erred in holding that it lacked subject matter jurisdiction over the suit against the state defendants. Whether the complaint states a claim against them upon which declaratory and injunctive relief may be granted against them in the absence of the federal defendants is a separate question. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). It is not a question we need address on this appeal, however, for as indicated below the federal defendants were properly joined in the district court.

B. The Federal Defendants

For subject matter jurisdiction as to the federal defendants the complaint relied upon 42 U.S.C. §§ 405(g) and 1383(c), on 28 U.S.C. § 1361, and on 28 U.S.C. § 1331. The district court rejected each basis of jurisdiction. We consider them separately.

42 U.S.C. §§ 405(g) and 1383(c)

Section 405(g) provides for jurisdictional review of decisions of the Secretary made after a hearing, in a civil action in a United States District Court. The trial court held that each named plaintiff and each class member must finally exhaust all administrative remedies before a complaint on his behalf for judicial review could be entertained. In so ruling the court failed to take into account this court's decision in *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333 (3d Cir.1977). In that case we held that section 405(g) permitted class actions on behalf of Supplemental Security Income recipients whose benefits have been reduced or terminated. We wrote:

> In order for a district court properly to entertain an action under § 405(g), two conditions must be satisfied. First, a claim for benefits must have been presented to the Secretary. Second, there must have been a final decision after hearing. The Supreme Court has held, however, that only the first condition is a mandatory requirement. The second—the requirement that the claimant exhaust his administrative remedies—can be waived either by the Secretary, *Mathews v. Diaz*, 426 U.S. 67. 76, 96 S.Ct. 1883 [1889] 48 L.Ed.2d 478 (1976), or, under certain circumstances, by the court on its own determination, *Mathews v. Eldridge*, 424 U.S. 319 [96 S.Ct. 893, 47 L.Ed.2d 18] (1976).

568 F.2d at 344. We held that the plaintiffs in *Liberty Alliance* had met the first, nonwaivable condition, because all the claimants were benefit recipients whose benefits had been reduced or terminated. *Id.* That holding is controlling in this case with respect to the first, non-waivable condition, for the plaintiffs and the class they seek to represent are identically situated.

Liberty Alliance also addressed the Social Security Administration's contention that the holding in *Mathews v. Eldridge*, 424 U.S. 319, 328 [96 S.Ct. 893, 899, 47 L.Ed.2d 18] (1976), was limited to challenges to agency action on constitutional grounds. We wrote:

> [*Weinberger v.*] *Salfi* [422 U.S. 749 [95 S.Ct. 2457, 45 L.Ed.2d 522] (1975)] teaches us that if the legal issue is constitutional, since the administrative agency cannot decide that issue, no exhaustion is required. 422 U.S. at 765, 95 S.Ct. 2457.... Where the legal issue is statutory, however, the agency does have authority to decide it, subject of course to judicial review. The test for exhaustion of a statutory issue in an individual case, we believe,

> should be whether the Secretary has taken a final position on that issue. In the class context the test should be no different.

568 F.2d at 345-46. Thus *Liberty Alliance* settles two points. There is no § 405(g) exhaustion requirement for constitutional issues, and for statutory issues the court may waive exhaustion if the Secretary has taken a final position on them.

Here the plaintiffs present both constitutional and statutory issues. Moreover the complaint alleges, and at this stage we must accept the allegation as true, that the challenged policies represent fixed positions of the Social Security Administration. Thus the complaint fails squarely within the *Liberty Alliance* holding.

While the trial court simply ignored *Liberty Alliance*, the Justice Department brief attempts to distinguish it on the ground that with respect to one named plaintiff, Mrs. Carney, the claim had been exhausted at the highest administrative level. Appellee's Brief at 25. The reference, however, to a single exhausted claim, is taken entirely out of context. The *Liberty Alliance* opinion points to the Secretary's decision in Mrs. Carney's case, not as satisfying the exhaustion requirement for the entire class, but as evidence of the fact that the Secretary had taken a final position on the legal issue. Fairly read, the complaint alleges that the Social Security Administration's position on the challenged procedures is final. The government has filed no affidavit to the contrary. The nonacquiescence memorandum of February 23, 1982 referred to above suggests rather strongly that the plaintiffs will be able to prove the allegation. But in any event, for purposes of this Fed.R.Civ.P. 12(b)(1) ruling the allegation in the com-

plaint controls and puts the case squarely within *Liberty Alliance*.

Although the Justice Department brief makes the rather lame attempt to distinguish *Liberty Alliance* referred to above, its real thrust is that the Secretary does not acquiesce in that holding. The Brief urges that *Mathews v. Eldridge* permits judicial waiver of exhaustion only with respect to constitutional issues which are "entirely collateral" to individual claims. Essentially the same argument was rejected by this court in *Liberty Alliance*, and for good reasons. There we noted:

> The sensible construction of § 405(g) in *Salfi*, *Eldridge*, and *Diaz* accommodates the sometimes competing needs of the administrative process for time to arrive at a mature judgment on often complex legal issues, of the judicial process for avoidance of multiple applications for judicial review, and of similarly situated benefit applicants for the avoidance of futile administrative delays in the determination of their benefits.

568 F.2d at 346. Each of the policy considerations adverted to in the quoted passage from *Liberty Alliance* is fully applicable here. Indeed, if the allegations of the instant complaint are proved, the policy arguments in favor of classwide relief are even stronger, for the plaintiffs in effect charge that the Social Security Administration has for budgetary reasons instructed those responsible for termination adjudications to disregard definitive interpretations of the Act made by the courts.

In any event, while the Secretary may feel free to express nonacquiescence in *Liberty Alliance* or any other construction of the Social Security Act announced by

this court, the rules under which we operate do not afford any such leeway.[2] This panel is, and the district court was, bound by *Liberty Alliance* unless the court in banc should choose to overrule it. Since *Liberty Alliance* was followed by *Mattern v. Mathews*, 582 F.2d 248, 249, 252-53 (3d Cir.1978), *cert. denied*, 443 U.S. 912, 99 S.Ct. 3101, 61 L.Ed.2d 876 (1979), and in *Town Court Nursing Center v. Beal*, 586 F.2d 266, 275 (3d Cir.1978) (in banc), an in banc overruling seems unlikely. The fact that other federal courts have followed the *Liberty Alliance* section 405(g) interpretation suggests a broad consensus. *See Wright v. Califano*, 587 F.2d 345, 349 (7th Cir.1978); *Jones v. Califano*, 576 F.2d 12, 19 (2d Cir.1978), *Caswell v. Califano*, 583 F.2d 9, 13 (1st Cir.1978); *Kennedy v. Harris*, 87 F.R.D. 372, 375 (S.D.Cal.1980); *Adams v. Califano*, 474 F.Supp. 974, 982 (D.Md.1979); *Fitzgerald v. Schweiker*, 538 F.Supp. 992, 997-98 (D.Md.1982).

Thus we hold that the trial court erred when it disregarded the controlling *Liberty Alliance* precedent and dismissed the complaint for lack of subject matter jurisdiction.

28 U.S.C. § 1361

In the district court the plaintiffs also asserted jurisdiction under the federal mandamus statute, 28 U.S.C. § 1361 (1976). The trial court, although citing in another context Judge Friendly's opinion in *Ellis v.*

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[2] Judge Weis has commented perceptively upon the costs resulting from the practice of federal agency nonacquiescence in decisions of the courts of appeals. *See Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462, 465-66 (3d Cir.1977) (Weis, J., concurring).

Blum, 643 F.2d 68 (2d Cir.1981), summarily rejected that basis for jurisdiction. In *Ellis v. Blum*, like this a challenge to an administrative action by the Social Security Administration, Judge Friendly carefully analyzes the scope of district court jurisdiction under 28 U.S.C. § 1361 to afford class-wide relief with respect to defective procedures. He holds that 42 U.S.C. § 405(h) does not affect the district court's jursdiction under section 1361. 643 F.2d at 82. We need not repeat here Judge Friendly's typically thorough and careful analysis. We only note that the *Ellis v. Blum* holding was anticipated in this court by our holding in *Mattern v. Weinberger*, 519 F.2d 150, 156-57 (3d Cir.1975), *vacated and remanded on other grounds, Mathews v. Mattern*, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976), that 28 U.S.C. § 1361 affords jurisdiction in a class action challenging the validity of recoupment procedures adopted by the Social Security Administration for the recovery of overpayments.

Thus the trial court erred as well in disregarding the *Mattern v. Weinberger* precedent and refusing to entertain the plaintiff's action under 28 U.S.C. § 1361.

§ 1331

Since we have already identified two separate statutes affording subject matter jurisdiction over plaintiffs' lawsuit against the federal defendants, there is no need to address the question whether, despite 42 U.S.C. § 405(h), 28 U.S.C. § 1331 provides subject matter jurisdiction for declaratory and injunctive relief with respect to procedures as distinguished from collection of benefits. *But see St. Louis University Hospital v. Blue Cross Hospital Services*, 537 F.2d 283, 291-92

(8th Cir.), *cert. denied*, 429 U.S. 977, 97 S.Ct. 484, 50 L.Ed.2d 584 (1976).

IV

Since there was subject matter jurisdiction over the claim against the state defendants under 28 U.S.C. § 1331 and subject matter jurisdiction over the federal defendants both under 42 U.S.C. § 405(g) and under 28 U.S.C. § 1361, the judgment dismissing the complaint for lack of subject matter jurisdiction will be reversed.

EDWARD R. BECKER, Circuit Judge, concurring.

While I agree that there was subject-matter jurisdiction over the federal and state defendants in this case and that the judgment dismissing the complaint for lack of subject-matter jurisdiction must be vacated and the case remanded for further proceedings, I disagree with the majority's approach and reach my conclusion on different grounds. I will consider the issues in the order set forth by the majority.

I. JURISDICTION OVER THE STATE DEFENDANTS

The majority concludes that subject-matter jurisdiction over the state defendants lies under 28 U.S.C. § 1331 (Supp. IV 1980) notwithstanding *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), in which the Supreme Court read 42 U.S.C. § 405(h) (1976)[1] as eliminating section 1331 jurisdiction over suits against the Social Security Administration to recover on any claim arising under the Social Security Act. *Id.* at 756-62, 95 S.Ct. at 2462-65. The majority purports to distinguish *Salfi* by observing that

> [s]ection 405(h) refers only to actions against the United States, the Secretary, or any officer or employee thereof. It cannot be construed as a limitation of state court jurisdiction over suits against state officers, or as a limitation of the general jurisdictional grant in section 1331 except as specified.

Majority op. at Part III.A. Because section 405(h) does not expressly preclude resort to section 1331 in suits

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[1] 42 U.S.C. § 405(h) (1976) provides, in relevant part: "No action against the United States, the Secretary, or any officer or employee thereof shall be sought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter."

against state defendants such as the Secretary of the Pennsylvania Department of Labor and Industry and the Director of the Pennsylvania Disability Determination Bureau, the majority concludes that *Salfi* simply "is not controlling," *id.*

I believe that the majority has read the Supreme Court's opinion too narrowly. It is true, of course, that section 405(h) does not expressly bar section 1331 jurisdiction over the state defendants, but the majority glosses over the fact that the state defendants are merely the alter egos of the federal defendants, who clearly fall within the ban of section 405(h). As Judge Friendly observed in *Ellis v. Blum*, 643 F.2d 68, 76 (2d Cir.1981), a case cited by the majority:

> On its face § 405(h)'s ban on actions "against the United States, the Secretary, or any officer or employee thereof" does not apply to a suit against *state* officials. However, a forceful argument can be made that the state officials administering the disability-benefits program are acting under color of federal law as mere agents of the Secretary, and as such are within the ambit of § 405(h). To hold otherwise arguably would invite applicants for Title II benefits to circumvent §§ 405(g) and (h) by bringing suit under § 1331 against the state officials instead of the Secretary, particularly now that the amount-in-controversy requirement of § 1331 has been eliminated as to all defendants.

I agree with this view and therefore conclude that plaintiffs cannot invoke section 1331 to gain jurisdiction over the state defendants.[2] I will address later, *see*

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[2] While the Second Circuit allowed the *Ellis* plaintiff to proceed against the state defendants under § 1331, it did so because of circumstances not present here. The *Ellis* court had

infra Part III, the basis upon which I do find jurisdiction over the state defendants.

II. JURISDICTION OVER THE FEDERAL DEFENDANTS: 42 U.S.C. § 405(g)

The majority concludes that 42 U.S.C. § 405(g) (Supp. V 1981)[3] provides a proper jurisdictional basis for the claims against the federal defendants despite the fact that none of the named plaintiffs, nor any of the class members, exhausted his or her administrative remedies. The majority bases its decision on *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333 (3d

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"little doubt that ... the scope of § 405(h) extends to suits in which claims aganst state officials are merely disguised disputes with the Secretary of the sort described in §§ 405(g) and (h)." 643 F.2d at 76, but found that plaintiff had alleged "separate and distinct" claims against the state defendants and that there thus was "no reason to extend the ban of § 405(h) to preclude § 1331 jurisdiction" over those claims, *id.* These "separate and distinct" claims alleged that the state defendants had violated, in bad faith, the procedures authorized by the Secretary; plaintiff also sought damages against the state defendants to redress her emotional distress. *Id.*

A review of the complaint filed in the case *sub judice* does not reveal an assertion of "separate and distinct" claims against the federal and state defendants. Accordingly, the rationale of *Ellis* does not apply, and § 1331 jurisdiction is not appropriate.

[3] Section 405(g) provides, in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

In addition, 42 U.S.C. § 1383(c)(3) (1976) provides that "[t]he final determination of the Secretary after a hearing under paragraph (1) [relating to procedures for payment of benefits] shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title."

Cir.1977), which the majority considers "controlling ... precedent," Majority op. at Part III.B.1. Indeed, the majority goes so far as to characterize as "lame" the Secretary's attempt to distinguish *Liberty Alliance*. *Id.*

I am far less certain that *Liberty Alliance* controls, for there are two arguable distinctions between that case and the one before us. First, one of the named plaintiffs in *Liberty Alliance* had exhausted her claims at the highest administrative level, thereby complying with section 405(g)'s mandate that district courts review only "final decision[s] of the Secretary made after a hearing to which [plaintiff] was a party." The case *sub judice* presents no exhausted claims. Second, the claim at issue in *Liberty Alliance* related to the way in which benefits were to be calculated[4] and thus was far more collateral to the award or denial of benefits than are the claims now being pursued before this Court.

I concede that *Liberty Alliance* is broadly written; I also note that Judge Gibbons is the author of that opin-

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[4] As we explained the question in *Liberty Alliance*:

> At issue ... is the proper interpretation of § 1611(h) of the Social Security Act Amendment of 1972, Pub.L. No. 92-603, tit. III, § 301, which provides that, in determining the amount of Supplemental Security Income benefits for blind persons, there shall be disregarded the greater of either the amount that could have been disregarded under the former state plan or the amount which would be disregarded under the relevant provisions of the Supplemental Security Income program. [Plaintiffs assert] that in addition to those forms of income specifically directed to be disregarded under the prior Pennsylvania plan, § 1611(h) mandates that the Secretary disregard income which, because of the state plan's assessment of basic, special, and spousal needs, would have been excluded from the computation of benefits under the state plan.

568 F.2d at 335-36. The claim, therefore, was purely mathematical.

ion as well as of the majority opinion here, and I therefore will not quarrel with his judgment that *Liberty Alliance* is apposite. I do not, however, agree that *Liberty Alliance* is itself *dispositive* of the case now before us. Rather, I believe that our finding of subject-matter jurisdiction over the federal defendants under 42 U.S.C. § 405(g) should be grounded on a restatement of the cardinal principles governing this area of the law as those principles may be synthesized from the decisions of the Supreme Court and this Court, including *Liberty Alliance*. I therefore will attempt such a restatement and, in so doing, will highlight my differences with Judge Gibbons over the scope of *Liberty Alliance*. While our differences may be matters of emphasis, I believe that they do have some substantive importance.

The foundation of *Liberty Alliance*, as of other exhaustion cases, is the Supreme Court's opinion in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *Eldridge* split section 405(g)'s "final decision" requirement into two components,

> only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

Id. at 328, 96 S.Ct. at 899. We are not concerned here with the "nonwaivable element" of section 405(g), for the complaint clearly alleges that all class members "have presented claims of continuing disability," Com-

plaint at ¶ 9. We therefore need focus only on that aspect of *Eldridge* that discusses the appropriateness of judicial waiver of the administrative remedies that follow the filing of a claim.

Plaintiff in *Eldridge* was a recipient of Social Security disability benefits; when notified that his benefits were to be terminated, Eldridge did not request reconsideration of the decision but filed suit against the Secretary, claiming that the due-process clause of the fifth amendment to the Constitution requires that a recipient of disability benefits be granted an evidentiary hearing prior to the termination of those benefits.

The Supreme Court ruled against Eldridge on the merits but upheld the taking of jurisdiction, recognizing that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330, 96 S.Ct. at 900. The Court deemed Eldridge's suit to be such a case because Eldridge had raised a constitutional, rather than a statutory, claim, and because that claim was "entirely collateral to his substantive claim of entitlement." *Id.* Moreover, the Court recognized the hardship that would befall Eldridge, were it necessary for him to save his contentions for the post-termination administrative-review process. *Id.* at 331-32, 96 S.Ct. at 900-01.

In the course of its opinion, the Court also articulated "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered," *id.* at 331 n.11, 96 S.Ct. 900 n.11. This principle is especially critical in light of the fact that "[i]t is unrealistic to expect that

the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context," *id.* at 330, 96 S.Ct at 900. The *Eldridge* approach, therefore, is a pragmatic one, focusing on the nature and collaterality of the asserted claim, including the likelihood that the Secretary would "consider substantial changes in the administrative review system" at the behest of a single claimant, and the harm that would be caused to the would-be plaintiff by relegating him to his administrative remedies.

Less than two years later, this Court decided *Liberty Alliance*, which addressed *Eldridge* and its predecessor, *Weinberger v. Salfi*, *supra*. We there noted the differences between unexhausted constitutional claims (as in *Eldridge*) and unexhausted statutory claims, 568 F.2d at 345-46, and observed:

> *Salfi* teaches us that if the legal issue is constitutional, since the administrative agency cannot decide that issue, no exhaustion is required.... Where the legal issue is statutory, however, the agency does have authority to decide it, subject of course to judicial review. The test for exhaustion of a statutory issue in an individual case, we believe, should be whether the Secretary has taken a final position on that issue. In the class context the case should be no different.

Id. at 346 (citations omitted). The finality of the Secretary's position in *Liberty Alliance* was evidenced by the Department of Health, Education, and Welfare's ("HEW's") conduct during negotiations with plaintiffs and by a letter from HEW stating that the Secretary would not modify his interpretation of the relevant stat-

utory provision except in response to legislative or judicial action. *Id.*[5]

Liberty Alliance and the majority here seem to focus exclusively on the question whether the Secretary has taken a fixed and final position on the asserted claim. As I read *Liberty Alliance*, however, this Court did not—and, indeed, could not—read out of the law the collaterality requirement that played so important a role in the Supreme Court's *Eldridge* opinion. It was unnecessary to dwell on that issue in *Liberty Alliance* because the plaintiffs' claim in that case, involving the calculation of benefits, *see supra* note 4, was clearly collateral to any substantive award or denial of those benefits.

I therefore conclude, after reviewing *Salfi*, *Eldridge*, and *Liberty Alliance*, that there are three basic criteria that must be met before judicial waiver of section 405(g)'s exhaustion requirement becomes appropriate: (1) the unexhausted claim must be at least substantially collateral to the question whether plaintiffs should continue to receive disability benefits; (2) the Secretary must have taken a fixed and final position on the unexhausted claim, thereby rendering exhaustion futile; and (3) requiring exhaustion must impose substantial hardship on, or cause irreparable harm to, the plain-

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[5] We also noted that the Secretary's "firm position has been *confirmed* in this lawsuit, in which one plaintiff . . . has fully exhausted all available administrative review." 568 F.2d at 346 (emphasis added). The majority thus may well be correct in its assertion that exhaustion by one plaintiff in *Liberty Alliance* was only "evidence of the fact that the Secretary has taken a final position on the legal issue," rather than a prerequisite for satisfying the exhaustion requirement in a class action, Majority op. at Part III.B.1.

tiffs.[6] It is only because I believe that each of these three criteria has been satisfied that I concur in the majority's waiver of the exhaustion requirement.

A. Collaterality

The defendants have argued that collaterality is absent here because plaintiffs' claims are inextricably intertwined with the merits of each disability-benefits termination decision.[7] It is impossible, defendants ar-

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[6] In propounding these three criteria, I have relied on the discussions in *Salfi*, *Eldridge*, and *Liberty Alliance* of statutory, rather than constitutional, claims. I read the claims set forth in plaintiffs' complaint as primarily statutory; I have significant doubts about their constitutional validity. However, by concluding that plaintiffs need not exhaust their statutory claims, I decide, a *fortiori*, that they need not exhaust their constitutional ones, which, according to *Liberty Alliance*, are subject to a lesser exhaustion standard, 568 F.2d at 346.

[7] As the Second Circuit recently said in *Smith v. Schweiker*, 709 F.2d 777, 780-81 (2d Cir. 1983):

> Exhaustion ... would frame the issue in a much clearer fashion than is possible when it is posed as an abstraction. While the legal issue raised by plaintiffs may seem well-defined to them, it seems rather unformulated to us. What is meant by evidence of medical improvement, for example, is somewhat ambiguous. If disability status has been previously determined on the grounds of paralysis from the neck down, a video tape of the claimant playing football might well seem sufficient evidence to terminate benefits. Yet plaintiffs seem at times to be arguing that unless the claimant's health has improved, i.e. the paralysis has disappeared rather than having been initially misdiagnosed, a termination of benefits is unlawful however conclusive the evidence of no present disability. At other times they seem to require medical testimony as essential to termination. It is also not clear why, if the initial disability determination was based on a finding of a lack of suitable jobs in the economy, evidence of medical improvement is necessary where a different finding as to the availability of such jobs based on new evidence is made. We note this, not to comment on the merits, but to suggest

gue, to isolate questions relating to the medical-improvement standard, testimony of treating physicians, and "sequential" evaluation from the medical and vocational history of each applicant. Moreover, imposition of a medical-improvement standard might even dictate the outcome of some cases.[8]

These are forceful arguments, but the fact remains that, should plaintiffs prevail on each of their claims in this case, the Secretary still will be at liberty to terminate all payments upon finding the recipients no longer disabled. The district court thus would not be ruling on the merits of the underlying claims for benefits but only on the *procedures* by which such determinations ultimately will be made by the state and federal agencies. I therefore believe that plaintiffs' claims are substantially collateral to the question whether plaintiff should continue to receive disability benefits.

B. Final Position and Futility of Exhaustion

I also believe that the Secretary has taken a fixed and final position on the questions raised by plaintiffs; judicial waiver of exhaustion requirements thus will not cause "premature interference with agency processes" or deny the agency the chance to "function efficiently," *Weinberger v. Salfi*, *supra*, 422 U.S. at 765, 95 S.Ct. at 2457. SSA Ruling 81-6 (1981), for example, sets out the

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that the claim raised by plaintiffs may seem far stronger, and certainly more clearly framed, when urged in the context of a concrete case, developed in the review process, with a factual record setting out the reasons for the prior ruling and subsequent termination, than when posed in the abstract.

[8] *But cf. infra* note 14 (discussing *Kuzmin v. Schweiker*, 714 F.2d 1233 (3d Cir.1983), and what evidence a claimant must present in a disability-benefits termination proceeding).

standards to be used in continuing-disability investigations and expressly rejects plaintiffs' medical-improvements claim: "It will not be necessary to determine whether or how much the individual's condition has medically improved since the prior favorable determination." App. at A42. *See also* Defendant's Response to Request for Admissions—First Set, App. at A59 ("Admit that there is no distinction in the standards of evaluating a claim on initial application or continuing disability review"; "finding of improvement in a claimant's condition is not required under the Secretary's regulations"). And the statement of defendant Barry H. Stern (Secretary of Pennsylvania's Department of Labor and Industry) to the United States Senate's Finance Committee on August 18, 1982, reveals that the Secretary also has taken a fixed position on plaintiffs' sequential-evaluation claim. Mr. Stern testified:

> SSA [Social Security Administration] now discourages the allowance of claims where an impairment is similar in severity, but not specifically described in the medical listing.
>
> Compounding this issue is that SSA no longer considers the combined effect of all impairments of the individual, but rather evaluates each impairment singularly, resulting in many of the multiply disabled being terminated from the disability rolls.

App. at A50. These and other indications of the Secretary's views constitute strong evidence that SSA has taken a fixed and final position on the claims at issue and that it therefore would be "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the be-

hest of a single aid recipient...." *Mathews v. Eldridge*, *supra*, 424 U.S. at 330, 96 S.Ct. at 900.

Notwithstanding this evidence, however, and in deference to the policies of judicial noninterference and avoidance of premature review that underlie the exhaustion requirement, I would be reluctant to find a fixed and final position on the part of the Secretary if I were convinced that the Secretary would yield to a court decision following full administrative review. Therefore, what really clinches this case for me is the Secretary's posture toward judicial declarations that displease SSA. In *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir.1981), the Court of Appeals for the Ninth Circuit held that payments to certain recipients of disability benefits could not be terminated absent proof of material medical improvement or of commission of clear and specific error during the prior determination. Following this ruling, Louis B. Hays, Associate Commissioner of SSA's Office of Hearings and Appeals, sent a memorandum to, *inter alia*, all administrative law judges:

> I want to draw your attention to Social Security Ruling SSR 82-10c in the January 1982 quarterly Rulings publication, indicating [SSA's] non-acquiescence in the Court's decision. Under SSA policy, it is not necessary to show that there has been improvement in the claimant's condition or any error in the prior State determination for benefits to be ceased....
>
> ....
>
> Social Security Ruling SSR 82-10c is binding on all components of SSA including administrative law judges and the Appeals Council (20 C.F.R. 422.408). SSA's policy must be followed in cases in-

> volving the issue of cessation of disability, including cases involving claimants who reside within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Memorandum from Louis B. Hays to All RCALJs, ALJICs, and ALJs (Feb. 23, 1982), App. at A43.[9] It thus appears that, when the Secretary has taken a final position on a disputed question, he will continue to adhere to, and require compliance with, those views even after a Court of Appeals has resolved the issue against him. Under these circumstances, exhaustion of administrative remedies becomes a mere exercise in futility, both for the claimants and for the courts. It makes far more sense to allow the claimants to litigate the case and, if successful, to obtain a decree enforceable via contempt proceedings.

C. Substantial Hardship and Irreparable Harm

I further conclude that it would cause great hardship, and possibly irreparable harm, to require plaintiffs to exhaust all levels of administrative review before filing this suit in the courts. What we said in *Liberty Alliance* still holds: "the plaintiffs here are largely dependent upon public assistance.... An erroneous termination or substantial reduction of this assistance would severely burden their subsistence. Requiring each plaintiff fully to exhaust his administrative remedies, especially where, as here, such exhaustion would be futile, would increase this burden." 568 F.2d at 345; *accord Mattern v. Mathews*, 582 F.2d 248, 253 (3d

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[9] Judge Weis had aptly commented upon a similar government litigation policy in *Goodman's Furniture v. United States Postal Serv.*, 561 F.2d 462 (3rd Cir.1977) (Weis, J., concurring).

Cir.1978), *cert. denied* 443 U.S. 912, 99 S.Ct. 3101, 61 L.Ed.2d 876 (1979). I also cannot help but note the time, effort, and anxiety involved in pursuing a claim through the administrative levels.[10]

Accordingly, I concur in the majority's judgment that jurisdiction under section 405(g) lies with respect to the federal defendants. It does not appear, however, that that provision may be invoked to assert jurisdiction over the state defendants. I therefore must consider whether any other jurisdictional basis exists with respect to those individuals.

III. MANDAMUS JURISDICTION: 28 U.S.C. § 1361

Plaintiffs also rely on 28 U.S.C. § 1361 (1976)[11] as an additional basis for jurisdiction over the federal defend-

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[10] Defendants seek to answer the irreparable-harm argument by focusing on recent amendments to the Social Security Act granting terminated claimants the option of continuing benefits until an administrative law judge reviews the state agency's determination. Pub.L. No. 97-455, 96 Stat. 2497 (1983). If the ALJ affirms the termination, the continued benefits will be considered overpayments subject to recoupment at the discretion of the Secretary.

The new law, however, does not significantly relieve the hardship to plaintiffs, for it expires in June 1984 and applies only to termination decisions made by state agencies between January 12, 1984, and October 1983. *See Rivera v. Heckler*, 568 F.Supp. 235 (D.N.J.1983). It therefore does not apply to plaintiffs, at least some of whom already had had their benefits terminated by the time this suit was filed in 1982, before the effective date of Pub.L. No. 97-455. Moreover, the new law does nothing to relieve the nonfinancial burdens imposed on these disabled plaintiffs.

[11] Section 1361 provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

ants, and the majority agrees, citing "the controlling *Mattern v. Weinberger* [519 F.2d 150, 156-57 (3d Cir.1975)] precedent" in support of that position, Majority op. at Part III.B.2. I note at the outset that the judgment in *Mattern* was vacated by the Supreme Court and the case remanded for further consideration in light of *Mathews v. Eldridge*, *supra*. *Mathews v. Mattern*, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976). When we reheard the case, we reserved the question whether mandamus jurisdiction lies in an action involving Social Security procedures. *Mattern v. Mathews*, *supra*, 582 F.2d at 253 ("Like the district court below, . . . we do not need to reach the question of mandamus jurisdiction."). Although we observed that "it is far from clear that section [405(h)] bars mandamus jurisdiction in this case," *id.*, it seems apparent to me that any further consideration of the availability of section 1361 jurisdiction must be *de novo*.

Because I agree with the majority that jurisdiction as to the federal defendants lies under section 405(g), I reach the section 1361 question only to decide whether jurisdiction lies over the state defendants.[12] I first will

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[12] I recognize that the complaint alleged § 1361 as a basis for jurisdiction only over the federal, and not the state, defendants. However, "our freedom to predicate jurisdiction on theories not pleaded below," *Ellis v. Blum*, *supra*, 643 F.2d at 75; *accord Mumford v. Glover*, 503 F.2d 878, 882-83 (5th Cir.1974); *Albert v. Chafee*, 465 F.2d 367, 368 (9th Cir.1972) (per curiam); 1 J. Moore, *Moore's Federal Practice* ¶ 0.60[3] at 623 n.5 (2d ed. 1982); *see Frederick L. v. Thomas*, 578 F.2d 513, 516 & n.6 (3d Cir.1978) (taking appellate jurisdiction under 28 U.S.C. § 1651 though appellant had pled jurisdiction only under 28 U.S.C. § 1291), convinces me that, at least in this case, plaintiffs' failure to rely on § 1361 as to the state defendants does not bar my considering that provision as a jurisdictional basis.

discuss whether section 1361 jurisdiction is available at all in cases that fall within section 405(g); I then will turn to the question whether this is an appropriate case in which to assert mandamus jurisdiction.

A. Availability of Mandamus Jurisdiction

The major obstacle to the availability, in theoretical terms, of jurisdiction under section 1361 is section 405(h), which might appear to channel *all* suits involving SSA procedures through section 405(g). As we have seen, section 405(h) bars resort to section 1331, *see Weinberger v. Salfi*, *supra;* it also precludes invocation of section 10 of the Administrative Procedure Act, *see Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). However, the Supreme Court has thrice reserved the question whether section 405(h) preempts mandamus jurisdiction, *see Califano v. Yamasaki*, 442 U.S. 682, 697-98, 99 S.Ct. 2545, 2555-56, 61 L.Ed.2d 176 (1979); *Norton v. Mathews*, 427 U.S. 524, 529-30, 96 S.Ct. 2771, 2774-75, 49 L.Ed.2d 672 (1976); *Mathews v. Eldridge*, *supra*, 424 U.S. at 332 n.12, 96 S.Ct. at 901 n.12, and this Court has not previously taken a position on this question, *see Mattern v. Mathews*, *supra*, 582 F.2d at 253.

The Court of Appeals for the Second Circuit, however, has addressed the issue and has held that section 405(h) does not override mandamus jurisdiction. *See Ellis v. Blum*, *supra*, 643 F.2d at 78-82.[13] In a compre-

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[13] I do not read the Second Circuit's opinion in *Smith v. Schweiker*, *supra* note 7, as retreating substantially from the position announced in *Ellis*. *Smith* held that "[m]andamus jurisdiction does not lie where the claims are not against the Secretary for failure to comply but rather are directed at the propriety of the regulations themselves," 709 F.2d at 779; this holding

hensive and scholarly opinion, Judge Friendly analyzed the legislative history of the relevant statutes and concluded that Congress never manifested an intention to preclude assertion of section 1361 jurisdiction in SSA cases. The Court of Appeals for the Ninth Circuit has reached a similar conclusion, holding that "language prohibiting reliance on the federal question or mandamus provisions for any action "to recover on a claim arising under the [Social Security] Act only applie[s] to actual claims for benefits." *Ringer v. Schweiker*, 697 F.2d 1291, 1293 (9th Cir.1982) (quoting section 405(h)) *cert. granted Heckler v. Ringer*, ___ U.S. ___, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983); *accord Ryan v. Shea*, 525 F.2d 268, 271-72 (10th Cir.1975).

As does the majority, I agree with the reasoning of *Ellis* v. *Blum* and see no need to repeat Judge Friendly's careful analysis. I therefore concur in the majority's conclusion that, at least in some cases, section 1361 jurisdiction is available to review SSA procedures.

As I noted above, I reach the mandamus question only in order to decide whether jurisdiction exists over the state defendants. Section 1361, by its terms, applies only to "officer[s] or employee[s] of the United States or any agency thereof" and thus might be read as not covering state officials such as the defendants in this case. These state defendants, however, are essentially the alter egos of their SSA counterparts and effectively are officers, employees, or agents of an agency of the United States.[14] Thus just as I would not allow section

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would seem to imply that section 1361 *may* be used in some cases. I also note that *Smith* did not even cite the 1981 *Ellis* decision and, at any rate, presumably cannot overrule it.

[14] Plaintiffs therefore cannot proceed against the state de-

1331 to be used to gain jurisdiction over these individuals, *see supra* Part I, I conclude, on the facts of this case, that the state defendants fall within the ambit of section 1361. *Cf. Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir.1974) (finding section 1361 jurisdiction over Adjutant General of Delaware National Guard because "Adjutant General of Delaware is an agency *or an agent* of the United States and therefore within the purview of § 1361") (emphasis added).

The next question, then, is whether this is an appropriate case for the assertion of mandamus jurisdiction.

B. Appropriateness of Mandamus Jurisdiction

Precisely why it believes mandamus jurisdiction to be appropriate in this case is something that the majority does not explain. I therefore will set forth the reasons why I believe that plaintiffs should be permitted to proceed against the state defendants under section 1361.

I begin with the proposition that courts traditionally have been reluctant to assert mandamus jurisdiction for the same reason that they generally have required exhaustion of administrative remedies: the desire to avoid premature judicial review and to minimize interference with the functioning of a coordinate branch of government. *Cf. Ellis v. Blum, supra*, 643 F.2d at 81 (allowing assertion of section 1361 jurisdiction only be-

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fendants under 28 U.S.C. § 1343(a)(3) (Supp. IV 1980), for the state defendants, in performing the roles delegated to them by federal statute, are not acting under color of state law; moreover, the Social Security Act is not legislation securing "equal rights" within the meaning of § 1343(3), *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 620-23, 99 S.Ct. 1905, 1917-18, 60 L.Ed.2d 508 (1979). *Accord Smith v. Schweiker, supra* note 7, 709 F.2d at 780.

cause it would result in a "minimum of interference" with SSA's judgment). Thus, we have held that mandamus is an appropriate remedy "only where a clear duty is owed the plaintiff or there is an abuse of discretion," *Grant v. Hogan*, 505 F.2d 1220, 1225 (3d Cir.1974); *accord Donovan v. United States*, 580 F.2d 1203, 1208 (3d Cir.1978). But when section 405(g) jurisdiction lies even in the absence of exhaustion of administrative remedies, as it does in this case, *see supra* Part II, I believe that the presence of those factors prompting judicial waiver of exhaustion requirements also insures that assertion of mandamus jurisdiction will not unduly threaten the prerogatives of the concerned agency.

As I discussed above, a court may waive section 405(g)'s exhaustion requirements only when (1) the claims presented to the court are substantially collateral to a substantive determination by the Secretary on the question whether to continue or terminate payment of disability benefits; (2) the Secretary has taken a fixed and final position on the litigated issues; and (3) the plaintiffs would suffer substantial hardship or irreparable harm if required to exhaust administrative remedies. Because I conclude that the issues presented by plaintiffs are in fact substantially collateral to plaintiffs' claims for benefits and that defendants have taken a fixed and final position on those issues, I do not see our assumption of jurisdiction under section 405(g) or section 1361 as interfering impermissibly with the operations of SSA or its affiliated state agencies. In short, I see little practical difference in a case such as this between the two jurisdictional bases, as both are informed by the same policy considerations.

It is true, as I noted above, that our mandamus cases appear to require the existence of a "clear right" owed by the defendant agency or official to the plaintiff. The existence *vel non* of such a clear right to relief, however, would seem to go to the merits of the claim and relate to whether or not a writ of mandamus should issue. On remand, therefore, the district court will have to determine whether plaintiffs have a clear right to the relief they seek. I note, however, that our recent decision in *Kuzmin v. Schweiker*, *supra*, would appear to provide a solid basis for plaintiffs' claims relating to the medical-improvement standard and the presumption of continuing disability.[15]

Accordingly, I conclude that, because plaintiffs have satisfied the criteria of *Mathews v. Eldridge*, *supra*, and *Liberty Alliance of the Blind v. Califano*, *supra*, they may proceed by means of section 1361 jurisdiction[16] against the state defendants.[17]

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[15] We held in *Kuzmin* that, "once the claimant [in a disability-benefits termination proceeding] has introduced evidence that his or her condition remains essentially the same as it was at the time of the earlier determination [of disability], the claimant is entitled to the benefit of a presumption that his or her condition remains disabling." *Kuzmin v. Schweiker*, *supra*, at 1237.

[16] *But cf. Smith v. Schweiker*, *supra* note 7, 709 F.2d at 779 (holding that mandamus jurisdiction does not lie in case involving an unexhausted medical-improvement claim).

[17] Even if my conclusion as to mandamus jurisdiction over the state defendants is incorrect, there would appear to be still another basis for jurisdiction over those individuals: pendent-party jurisdiction. The state defendants, as I have said before, *see supra* Parts I and IIIA, are the alter egos of the federal defendants, and it would seem wasteful to prevent plaintiffs from including them in the proceedings.

Because plaintiffs allege basically identical claims against the state and federal defendants, and because the state defendants

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appear here only as agents of SSA, the concerns expressed in *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), which involved separate state-law claims brought against the defendant that plaintiff sought to add as a pendent party, do not seem to apply here and thus do not bar an assertion of jurisdiction. I also note that *Aldinger* purported to decide

> only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together. As we indicated at the outset of this opinion, the question of pendent-party jurisdiction is "subtle and complex," and we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction.

Id. at 18, 96 S.Ct at 2422 (footnote omitted). Jurisdiction over the claims against the federal defendants, at least, would seem to be allowable only under 42 U.S.C. § 405(g) or 28 U.S.C. § 1361; thus, unlike those in *Aldinger*, the claims are exclusively within the province of the federal courts. Pendent-party jurisdiction therefore is more appropriate here than it was in that case. *Cf. Stewart v. United States*, 716 F.2d 755, 757-759 (10th Cir.1982) (allowing pendent-party jurisdiction in Federal Tort Claims Act suit over driver of Government vehicle who was employed by private operator of Government-owned nuclear-weapons facility).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1514

FRANK KUEHNER, DOROTHY BURAYAK, RICHARD BURNS, ALICE HETHERINGTON, FRANK JENNINGS, JR., PHILIP FISHER, CLINTON ROYAL, SOLOMON KATZ, RAYMOND STANIEWICZ, JAMES N. MCKEOWN, JAMES LOUGHLIN, MARGARET DOUGLAS, LAWRENCE COOK, STEVEN SVERDLOW, ELAINE FLEIGELMAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JAMES MCKEOWN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

v.

RICHARD SCHWEIKER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, BARRY STERN, SECRETARY, PA. DEPT. OF LABOR AND INDUSTRY, JOHN DELPAINE, DIRECTOR, PA. DISABILITY DETERMINATION BUREAU

~~(D.C. Civil No. 82-1839)~~

**ON APPEAL
FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

(D.C. Civil No. 82-1839)

JUDGMENT

Present: GIBBONS, and BECKER, *Circuit Judges* and WEBER, *District Judge**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 1, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 2, 1982, be, and the same is hereby reversed.

ATTEST

/s/ Sally Mvros
SALLY MVROS
Clerk

SEPTEMBER 19, 1983

*Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1514

FRANK KUEHNER, DOROTHY BURAYAK, RICHARD BURNS, ALICE HETHERINGTON, FRANK JENNINGS, JR., PHILIP FISHER, CLINTON ROYAL, SOLOMON KATZ, RAYMOND STANIEWICZ, JAMES N. MCKEOWN, JAMES LOUGHLIN, MARGARET DOUGLAS, LAWRENCE COOK, STEVEN SVERDLOW, ELAINE FLEIGELMAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JAMES MCKEOWAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

v.

MARGARET M. HECKLER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, BARRY STERN, SECRETARY, PA. DEPT. OF LABOR AND INDUSTRY, JOHN DELPAINE, DIRECTOR, PA. DISABILITY DETERMINATION BUREAU

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, WEBER, *District Judge**

*Hon. Gerald J. Weber, United States District Judge for the

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing particularly in light of *Heckler v. Lopez*, 104 S. Ct. 10 (1983), No. A-145, granting application for stay in *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983).

By the Court,

/s/ John J. Gibbons
JOHN J. GIBBONS
Judge

Dated: NOVEMBER 28, 1983

Western District of Pennsylvania, on panel rehearing only.

APPENDIX D

UNITED STATES DISTRICT COURT, E. D. PENNSYLVANIA.

C.A. No. 82-1839.

FRANK KUEHNER, ET AL.

v.

RICHARD S. SCHWEIKER, ET AL.

JULY 30, 1982.

MEMORANDUM OPINION AND ORDER

WEINER, District Judge.

This action involves issues concerning review of disability cases to ascertain whether the recipients are currently disabled as defined by law. The plaintiffs bring this action on behalf of a class of all Pennsylvania Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) Disability beneficiaries whose benefits have been terminated or are threatened with termination. The plaintiffs challenge the standards employed in conducting these reviews and claim that they are violative of the Social Security Act and the Due Process guarantees of the Constitution. Their claims rest on the following four grounds by which defendants have allegedly erroneously and illegally terminated or threatened to terminate plaintiffs and their class members from receipt of SSDI or SSI benefits by failing:

(a) to determine whether substantial medical improvement has occurred;
(b) to allow presumptive effect to prior determination of disability;

(c) to develop fully and to accord appropriate weight to evidence from treating medical personnel; and

(d) to follow a proper sequential disability evaluation process, including consideration of medical equivalence, combination of impairments, pain, and residual functional capacity.

On these grounds, plaintiffs seek a declaration that the standards applied and procedures followed in determining that the terminations of benefits are erroneous and illegal, and seek an injunction barring defendants from terminating benefits in such cases. The defendants move for an order of dismissal of the action for lack of subject matter jurisdiction. We grant defendants' motion and direct plaintiffs to pursue their available and adequate administrative remedies.

The plaintiffs assert that this court has jurisdiction to hear their claims under 42 U.S.C. 405(g). This section provides for judicial review of a final decision of the Secretary made after a hearing by commencement of a civil action within sixty days after notice of the decision. *Weinberger v. Salfi*, 422 U.S. 749, 763, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522 (1975). The requirement that there shall have been a decision of the Secretary which was "final" and "made after a hearing" was found to be central to the grant of subject matter jurisdiction by a court. *Id.* at 764, 95 S.Ct. at 2466. This administrative exhaustion requirement assures that the agency functions efficiently and has an opportunity to correct its own errors, as well as affords the parties and courts the benefit of its experience and expertise and its com-

pilation of a record which is adequate for judicial review. *Id.* at 765, 95 S.Ct. at 2466.

The initial determination of what constitutes a "final" decision is left to the Secretary, as is the determination of when full exhaustion of internal review procedures is not necessary to meet the requirement of a "final" decision under 405(g). As the Supreme Court stated in *Weinberger v. Salfi, supra*, at 765-767, 95 S.Ct. at 2466-2467, where the Secretary has satisfied himself that the claim is neither otherwise invalid nor otherwise cognizable under another statutory provision and that the only issue is constitutional, he may voluntarily waive the exhaustion prerequisite. This determination is left to the Secretary since ultimate responsibility for the integrity of the administrative program is his. In the case *sub judice*, plaintiffs' claims are both factual and legal, disputing findings of fact and applications of statutory and regulatory law. The Secretary has determined that these claims should be pursued according to the administrative process and that a record should be compiled according to such process. Upon a finding that plaintiffs' claims are valid, the Secretary would then confer the relief plaintiffs sought—that they are entitled to continue to receive disability benefits. If the Secretary were to find that the claims were invalid, then the court and parties would have a fully compiled record for adequate review. For these reasons, the Secretary refuses to waive the statutory requirement of exhaustion of remedies.

Neither is this an instance in which the exhaustion requirement would be appropriately waived by the court. Such judicial waiver has occurred in the past where the action involved a constitutional challenge

which was collateral to the substantive claim of entitlement. *Mathews v. Eldridge*, 424 U.S. 319, 330, 96, S.Ct. 893, 900, 47 L.Ed.2d 18 (1975). The judicial waiver has not been allowed where the action is directed towards upsetting the determination of the Secretary on the merits, as it is clearly not collateral to the substantive claim and exhaustion is required under 405(g). *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070 (D.C.Cir. 1978). This is equally so where the challenge is a constitutional one to statutory provisions limiting the availability of benefits and where the challenge is on the merits to limitations on benefits imposed by regulations. *Id; Rhode Island Hospital v. Califano*, 585 F.2d 1153 (1st Cir. 1978). In the recent case of *Humana*, the Court of Appeals for the District of Columbia Circuit refused to consider statutory and constitutional contentions challenging regulations limiting reimbursement. The court held that the statutory and constitutional claims consisted of a grievance respecting the amount of reimbursement due and was "unmistakably directed at upsetting on the merits the Secretary's determination." Therefore, the grievance must first be submitted for any administrative processing available under the Act's procedures. *Id.*, at 1079. *Accord*, *Rhode Island Hospital v. Califano*, *supra*, at 1158-1159. The *Humana* court further held that the district court, refusing to order the requested retroactive corrective adjustments, but instead directing an administrative redetermination of the acceptable level of remedies, could not alter the essential character and objective of the suit nor the need for prior resort to the administrative process. *Humana of South Carolina, Inc., v. Califano*, *supra*, at 1080. The case *sub judice* is

similar in that plaintiff's claims consist of a grievance respecting the benefits due, namely that plaintiffs should continue to receive benefits, and is directed at upsetting the merits of the Secretary's determination. Their constitutional claims are inextricably intertwined with these grievances. They are not collateral. Such claims should be submitted for any administrative processing available under the Social Security Act.

Because the exhaustion requirement is "something more than simply a codification of the judicially developed doctrine of exhaustion which cannot be disposed of by merely a judicial conclusion of futility," *Weinberger v. Salfi*, *supra* at 766, it cannot be excused by a claim that the administrative process is unlikely to be resolved in favor of plaintiffs. Neither can it be disposed of by a claim of delayed review. *Bob Jones University v. Simon*, 416 U.S. 725, 747, 94 S.Ct. 2038, 2051, 40 L.Ed.2d 496 (1974). Both of these conditions, even if present, do not persuade this court to waive the exhaustion requirement in the case *sub judice*.

For the court to circumvent the exhaustion requirement and review plaintiffs' individual claims would impose an impossible burden of proof upon the Secretary. To disprove such a claim, the Secretary would be required to prove that the evaluative procedures were followed in each individual case without the benefit of a full administrative record and background on claimants typically developed when the administrative process runs it full course. For the court to circumvent the process and review *en masse* plaintiffs' claims without regard to the specific facts of each individual's case, contradicts the statute's demand that "disability claims be evaluated on a case-by-case method, taking into ac-

count each applicant's peculiar characteristics." *Santise v. Schweiker*, 676 F.2d 925, 930 (3d Cir. 1982).

Such dangerous and unwarranted results further support the requirements of 405(g) and the proposition that a judicial review of the Secretary's actions is exclusive and cannot be circumvented by resort to the general jurisdiction of the district courts. Surely, the language of 405(g) does not suggest that Congress in 1939 thought it was establishing procedures to be used in class actions challenging the constitutionality of the provisions of the Act or of procedures adopted by the Secretary, and seeking broad injunctive and declaratory relief. *Ellis v. Blum*, 643 F.2d 68, 74 (2d Cir. 1981).

Alternatively, plaintiffs assert that this court has a jurisdictional basis under the mandamus statute, 28 U.S.C. § 1361. However, this section provides mandamus jurisdiction only where there are "extraordinary circumstances." *Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S.Ct. 2119, 2123-2124, 48 L.Ed.2d 725 (1976); *State Board of Education v. Fox*, 620 F.2d 578, 579 (6th Cir. 1980). The party seeking such jurisdiction must have "no other adequate means to attain the relief he desires." *Kerr v. United States District Court*, *supra* at 403. *See also*, *Kennecott Copper Corp.*, *Nevada Mines v. Costle*, 572 F.2d 1349, 1356 (9th Cir. 1978); *Haneke v. Secretary of HEW*, 535 F.2d 1291, 1296 n. 15 (D.C.Cir.1976); 1 *Moore's Federal Practice*, ¶ 0.62[17], at 700.51. In the case *sub judice*, plaintiffs have not satisfied the criteria for the extraordinary remedy of mandamus. The plaintiffs have other ample and available means by which to have their claims reviewed, such as the administrative procedures of an Administrative Law Judge hearing and an Ap-

peals Council review, and such as judicial review pursuant to 405(g) with the benefit of an administrative record.

The plaintiffs' assertion of jurisdiction under 28 U.S.C. § 1343 over State defendants must also fail. Section 1343 requires that persons have acted "under color of any state law, statute, ordinance, regulation, custom or usage," for jurisdiction to be established. The State defendants administering the disability benefits program have acted under color of federal law as mere agents of the Secretary and have not acted under color of any State law or statute in the case *sub judice*. *Ellis v. Blum*, *supra* at 74.

Lastly, the assertion of pendent jurisdiction must fail. The doctrine of pendant jurisdiction is applicable only where there is a federal claim and a state claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-726, 86 S.Ct. 1130, 1138-1139, 16 L.Ed.2d 218 (1966). As previously stated, there is neither a federal nor state claim in the case *sub judice* at this time.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. (Supp. V) 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. 1361 provides:

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Section 205(b), (g) and (h) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405(b), (g) and (h) provide:

Evidence, procedure and certification for payments

* * * * *

(b) Administrative determination of entitlement to benefits statement; findings of fact; hearings; investigations

The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and

stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United

States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the

court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

4. Sections 221(a), (c), (d) and (h) of the Social Security Act, as codified at 42 U.S.C. (Supp. V) 421(a), (c), (d) and (h), provide:

Disability determinations

(a) State agencies

(1) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall be made by a State agency, notwithstanding

any other provision of law, in any State that notifies the Secretary in writing that it wishes to make such disability determinations commencing with such month as the Secretary and the State agree upon, but only if (A) the Secretary has not found, under subsection(b)(1) of this section, that the State agency has substantially failed to make disability determinations in accordance with the applicable provisions of this section or rules issued thereunder, and (B) the State has not notified the Secretary, under subsection (b)(2) of this section, that it does not wish to make such determinations. If the Secretary once makes the finding described in clause (A) of the preceding sentence, or the State gives the notice referred to in clause (B) of such sentence, the Secretary may thereafter determine whether (and, if so, beginning with which month and under what conditions) the State may again make disability determinations under this paragraph.

(2) The disability determinations described in paragraph (1) made by a State agency shall be made in accordance with the pertinent provisions of this subchapter and the standards and criteria contained in regulations or other written guidelines of the Secretary pertaining to matters such as disability determinations, the class or classes of individuals with respect to which a State may make disability determinations (if it does not wish to do so with respect to all individuals in the State), and the conditions under which it may choose not to make all such determinations. In addition, the Secretary shall promulgate regulations specifying, in such detail as he deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure ef-

fective and uniform administration of the disability insurance program throughout the United States. The regulations may, for example, specify matters such as—

(A) the administrative structure and the relationship between various units of the State agency responsible for disability determinations,

(B) the physical location of and relationship among agency staff units, and other individuals or organizations performing tasks for the State agency, and standards for the availability to applicants and beneficiaries of facilities for making disability determinations,

(C) State agency performance criteria, including the rate of accuracy of decisions, the time periods within which determinations must be made, the procedures for and the scope of review by the Secretary, and, as he finds appropriate, by the State, of its performance in individual cases and in classes of cases, and rules governing access of appropriate Federal officials to State offices and to State records relating to its administration of the disability determination function,

(D) fiscal control procedures that the State agency may be required to adopt, and

(E) the submission of reports and other data, in such form and at such time as the Secretary may require, concerning the State agency's activities relating to the disability determination.

Nothing in this section shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law.

* * * * *

(c) Review of determination by Secretary

(1) The Secretary may on his own motion or as required under paragraphs (2) and (3) review a de-

termination, made by a State agency under this section, that an individual is or is not under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may modify such agency's determination and determine that such individual either is or is not under a disability (as so defined) or that such individual's disability began on a day earlier or later than that determined by such agency, or that such disability ceased on a day earlier or later than that determined by such agency. A review by the Secretary on his own motion of a State agency determination under this paragraph may be made before or after any action is taken to implement such determination.

(2) The Secretary (in accordance with paragraph (3)) shall review determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title). Any review by the Secretary of a State agency determination under this paragraph shall be made before any action is taken to implement such determinaton.

(3) In carrying out the provisions of paragraph (2) with respect to the review of determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title), the Secretary shall review—

(A) at least 15 percent of all such determinations made by State agencies in the fiscal year 1981,

(B) at least 35 percent of all such determinations made by State agencies in the fiscal year 1982, and

(C) at least 65 percent of all such determinations made by State agencies in any fiscal year after the fiscal year 1982.

(d) Hearings and judicial review

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

* * * * *

(h) Periodic reviews of eligibility

In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Secretary (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years; except that where a finding has been made that such disability is permanent, such reviews shall be made at such times as the Secretary determines to be appropriate. Reviews of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or provided for under or in the administration of this subchapter.

5. Section 1631(c) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 42 U.S.C. 1383(c), provides:

Procedure for payment of benefits

* * * * *

(c) Hearing to determine eligibility or amount of benefits; time within which to request

hearing; time for determinations of Secretary pursuant to hearing; judicial review

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of

section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

* * * * *

6. 20 C.F.R. 416.903, governing the Supplemental Security Income Program, provides:

Who makes disability and blindness determinations.

(a) *State agencies.* State agencies make disability and blindness determinations for the Secretary for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function. States have the option of turning the function over to the Federal Government if they no longer want to make disability determinations. Also, the Secretary may take the function away from any State which has substantially failed to make disability and blindness determinations in accordance with these regulations. Subpart J of this part contains the rules the States must follow in making disability and blindness determinations.

(b) *Social Security Administration.* The Social Security Administration will make disability and blindness determinations for the Secretary for—

(1) Any person living in a State which is not making for the Secretary any disability and blindness determinations or which is not making those

determinations for the class of claimants to which that person belongs; and

(2) Any person living outside the United States.

(c) *What determinations are authorized.* The Secretary has authorized the State agencies and the Social Security Administration to make determinations about—

(1) Whether you are disabled or blind;

(2) The date your disability or blindness began; and

(3) The date your disability or blindness stopped.

(d) *Review of State Agency determinations.* On review of a State agency determination or redetermination of disability or blindness we may find that—

(1) You are, or are not, disabled or blind, regardless of what the State agency found;

(2) Your disability or blindness began earlier or later than the date found by the State agency; and

(3) Your disability or blindness stopped earlier or later than the date found by the State agency.

ORIGINAL

No. 83-1993

Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY
OF HEALTH AND HUMAN
SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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35 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the District Court have jurisdiction over a class action by recipients of Social Security disability benefits to enjoin the Secretary, in state and federal eligibility reviews, from continuing to apply evidentiary standards and procedures previously determined to be illegal by the Third Circuit where some class members had not completed the Secretary's administrative process?

2. In making a determination whether jurisdiction exists under 42 U.S.C. §405(g) (Supp. V 1983), and all other jurisdictional requirements are met, must a federal court defer to the determination of the Secretary of Health and Human Services that full exhaustion of administrative remedies should be required, if the Secretary's determination is an integral part of a program of resistance to final federal Court of Appeals interpretations of law, and further exhaustion is objectively futile?

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In the Supreme Court of the United States

October Term, 1983

No. 83-1593

Margaret M. Heckler, Secretary
of Health and Human
Services, et al., Petitioners

v.

Frank Kuehner, et al., Respondents

Brief in Opposition to Petition for a Writ of
Certiorari to the United States Court
of Appeals for the Third Circuit

Respondents oppose the petition of the Solicitor General for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The opinions below, jurisdiction of this Court, and statutory and regulatory provisions at issue are as stated in the petition.

COUNTERSTATEMENT OF THE CASE

This is a class action filed on April 29, 1982, in the United States District Court for the Eastern District of Pennsylvania, against the Secretary of Health and Human Services (the "Secretary"), the Commissioner of Social Security, and two state officials responsible for administering Social Security disability claims under contract with the Secretary. It involves questions whether the Secretary refuses to follow controlling Third Circuit precedent in disability review proceedings and, if so, whether respondents are entitled to class-wide relief. The sixteen named plaintiffs represent a class consisting of all disability beneficiaries under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§401 et seq., 1381 et seq.,[1] who reside in Pennsylvania and who have presented claims for continuing benefits.[2]

Beginning in March 1981, the named plaintiffs and all class members (except a small number whose disabilities have

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1. Title II of the Social Security Act provides for disability insurance benefits (SSDI) for disabled workers. 42 U.S.C. §401 et seq. SSDI benefits are based upon an individual's earnings records and are paid without regard to financial need. Title XVI of the Social Security Act provides for Supplemental Security Income (SSI) for persons who are both poor and disabled. 42 U.S.C. §1381 et seq. SSI benefits are paid to eligible poor persons whose income and resources fall below a certain level.

2. A motion to alter the class certification to include initial applicants for disability benefits has been filed in the District Court, but has not been acted upon. Four of the original named plaintiffs, including Mr. Royal, see Petn. for Cert. 7 n.3, are no longer actually involved in this case.

been deemed permanent) became subject to two types of mass reviews of their eligibility to receive benefits. First, pursuant to Section 311 of the Social Security Disability Amendments of 1980, 42 U.S.C. §421(h)(1), they became subject to "continuing disability investigations" at least every third year. Second, those named plaintiffs and class members whose disabilities were expected to be of limited duration were scheduled for "medical diaried" reviews on dates by which the Secretary estimated they might no longer be disabled.

The Social Security Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months." 42 U.S.C. §§423(a)(1), 1382(c)(3)(A). The administrative standards and procedures for determining continuing disability under Title II and Title XVI are set forth at 20 C.F.R. §404, subpart P, and §416, subpart I. When a recipient's eligibility for benefits is reviewed, the recipient is contacted by the state agency and told that his or her case is being reviewed to determine whether he or she is still disabled. If the state agency determines that the recipient is no longer disabled, it sends the recipient a letter informing him or her of the determination; the Social Security Administration terminates payments of benefits shortly thereafter. A recipient may request reconsideration from the

state agency, and may seek further review of a termination of benefits from (in turn) an Administrative Law Judge, the Social Security Administration Appeals Council, and the federal courts. (An SSI recipient appeals a termination on medical grounds directly to an ALJ.) See Heckler v. Day, No. 82-1371 (May 22, 1984). Appeal through the federal district court level generally takes at least two years from the date of denial of benefits.

The massive number of continuing disability investigations and medical diaried reviews since 1981 have caused incalculable havoc in the lives of persons previously receiving disability benefits. The "tragic human cost" of the review programs generally, including suicides and terminations of persons whose medical conditions had actually deteriorated, has been documented in Oversight of Social Security Disability Benefits Terminations: Hearings before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 97th Cong., 2d Sess. (1982) ("Oversight Hearings").

Respondents' claims concern four specific aspects of the process by which such reviews are being carried out:

1. Social Security Administration regulations and policy statements expressly countenance findings that beneficiaries are no longer disabled without any finding that or inquiry whether their medical condition has improved since their prior hearings.[3] The Third Circuit and other Courts

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3. See Social Security Ruling, 81-6; 82-10c; Memorandum from Louis B. Hays, Associate Commissioner of Office of Hearings and Appeals (Feb. 29, 1982), App. at A43.

of Appeals have held that, when the Secretary or a federal court has made a previous finding of disability, the Social Security Act and the Due Process Clause of the Constitution require some evidence of improvement before determining that an individual is no longer disabled.[4]

2. Social Security Administration regulations and policy statements fail to afford beneficiaries any presumption that their previously determined disabilities continue to exist. Thus, persons who have received disability benefits for years, or who have been determined to be disabled within the past year, must carry the full burden of presenting evidence that they are presently disabled in administrative review proceedings, as if they were initial applicants for benefits. At least two Circuits have held that the Secretary must carry the burden of going forward in such instances.[5]

3. The Social Security Administration does not accord substantial weight to the reports of the physicians responsible for the ongoing treatment of disabled persons, and it terminates benefits solely on the basis of brief "consultative" examinations by doctors paid by the Social Security Administration or state agencies, without any finding that the reports of such doctors are more complete or reliable than those of the treating physician.[6] The failure to

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4. Daring v. Heckler, 727 F.2d 64, 68-69 (3d Cir. 1984); Kuzmin v. Schweiker, 714 F.2d 1233, 1237 (3d Cir . 1983); Simpson v. Schweiker, 691 F.2d 966, 920 (11th Cir. 1982); Patti v. Schweiker, 669 F.2d 582, 587 (9th Cir. 1982).

5. Patti v. Schweiker, supra; Rivas v. Weinberger, 475 F.2d 255 (5th Cir. 1973).

6. See 20 C.F.R. §§ 404.1526-.1527, 416.926-.926, Social Security Rulings 82-58; cf. Social Security Administration, Office of Hearings and Appeals, Memorandum to Administrative Law Judges (April 29, 1982), reprinted in Social Security Forum 15 (July 1982).

accord substantial weight to treating physician reports directly contravenes case law in the Third Circuit and elsewhere.[7]

4. The Social Security Administration regulations and rulings direct state agencies and federal Administrative Law Judges to ignore the combined effect of several impairments (each of which the Secretary considers "nonsevere") and to ignore the effect of pain and other symptoms in certain cases.[8] The Third Circuit has held that the Secretary must consider the combined effects of impairments.[9] The Third Circuit and other Circuits have held that pain alone may constitute

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7. See Wallace v. Secretary of HHS, 722 F.2d 1150, 1155 (3d Cir. 1983); Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983); Cotter v. Harris, 642 F.2d 700, 707 (3d Cir. 1981); Rossi v Califano, 602 F.2d 55, 56-58 (3d Cir. 1979); Wiggins v. Schweiker, 679 F.2d 1387, 1389-1390 (11th Cir. 1982); Carver v. Harris, 634 F.2d 363 (7th Cir. 1980); Bowman v. Heckler, 706 F.2d 564, 568 (5th Cir. 1983); Miranda v. Secretary of HEW, 514 F.2d 966, 999 (1st Cir. 1975); McLaughlin v. Secretary of HHS, 612 F.2d 701, 705 (2d Cir. 1980).

8. See 20 C.F.R. §§404.1522,-.1529, 416.922,-.929; Social Security Rulings 82-55, 82-58. Petitioner Stern has testified before the Senate Finance Comittee that "SSA no longer considers the combined effect of all impairments of the individual, but rather evaluates each impairment singularly, resulting in many of the multiply disabled being terminated from the disability rolls." Statement of Barry H. Stern before the Senate Finance Committee, August 18, 1982; App. at A50.

9. Burnham v. Schweiker, 682 F.2d 456, 458 (3d Cir. 1982). See also Wiggins v. Schweiker, supra 679 F.2d at 92.

a medical impairment within the meaning of the Social Security Act.[10]

Respondents requested declaratory and injunctive relief against all defendants, restraining them from denying benefits to any class member on the basis of the challenged practices.

As of the date of respondents' amended complaint, all named plaintiffs had been initially reviewed and had either had their benefits terminated or received notice of imminent termination. Only one of the named plaintiffs, Clinton Royal, had exhausted his administrative remedies (his benefits were terminated in June 1980, substantially before any of the other named plaintiffs).[11] No allegation was made that all class members had exhausted their administrative appeals.

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10. Smith v. Schweiker, 671 F.2d 789, 793 (3d Cir. 1982); Taybron v. Harris, 667 F.2d 412, 415 (3d Cir. 1981); Smith v. Harris, 644 F.2d 985, 988 (3d Cir 1981); Layton v. Heckler, 726 F.2d 440, 442 (8th Cir. 1984); Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983); Murray v. Heckler, 722 F.2d 499, 502-503 (9th Cir. 1983); Benson v. Schweiker, 652 F.2d 406, 409 (5th Cir. 1981); Myers v. Califano, 611 F.2d 980, 983 (4th Cir. 1980); Marcus v. Califano, 615 F.2d 23, 27-29 (2d Cir. 1979); Miranda v. Secretary, supra.

    The Eighth Circuit has specifically noted, "For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain." Nelson v. Heckler, supra, 712 F.2d, at 348; cf. Heaney, Why the High Rate of Reversals in Social Security Disability Cases?, 7 Hamline L. Rev. 1 (1984).

11. Since the filing of the amended complaint, all original named plaintiffs have continued to pursue their individual administrative remedies. Eleven have received

[Footnote 11 continued on next page]

A number of the named plaintiffs had received disability benefits without question as to eligibility for over a decade. Others had been found disabled within the previous year and were being terminated based on the same evidence that had resulted in the prior award of benefits. Many members of the class whose benefits were terminated had been awarded full benefits by courts following the Third Circuit authorities that the Secretary refuses to apply.

The District Court dismissed respondents' complaint for lack of subject matter jurisdiction. It held that respondents could not obtain jurisdiction over the federal defendants under the judicial review provisions of the Social Security Act, 42 U.S.C. §§405(g) and 1383(c)(3) (hereafter "§405(g)"), under the general federal question jurisdictional provisions, 28 U.S.C. §1331, or under the mandamus statute, Id. §1361. As to the state defendants, the District Court evaluated respondents' jurisdictional claims only under 28 U.S.C. §1343, holding that jurisdiction could not be founded on that statute because the state defendants had "acted under

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[Footnote 11 continued from previous page]

reinstatement of their benefits at the administrative level; two were denied benefits at the administrative level and appealed unsuccessfully to the District Court, and one of these presently has an appeal pending before the Third Circuit. All named plaintiffs continue to be subject to continuing disability investigations, but see n. 27, infra, or medical diaried reviews, in which the Secretary will apply the illegal standards which are the subject of this case.

color of federal law as mere agents of the Secretary and have not acted under color of any State law," Petn. for Cert. App., at 45a.

The Court of Appeals for the Third Circuit reversed. It held that the District Court had failed to follow (or even to acknowledge) controlling precedent in the Third Circuit as to both §405(g) and the mandamus statute. Liberty Alliance for the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977); Mattern v. Weinberger, 519 F.2d 150 (3d Cir. 1975), vacated and remanded on other grounds sub nom. Mathews v. Mattern, 425 U.S. 987 (1976). Applying these precedents, the Court of Appeals found jurisdiction proper as to the federal defendants under either statute. Petn. for Cert. App., at 7a-12a. The Court of Appeals also held that 28 U.S.C. §1331 provided jurisdiction over the state defendants.

One member of the Court of Appeals, Judge Becker, filed a separate concurring opinion. Pet. for Cert. App., at 14a-34a. He agreed with the majority that jurisdiction over the federal defendants existed under §405(g), but he explained his reasons at greater length, both in light of prior Supreme Court precedent and in light of the Secretary's policy of nonacquiescence in Court of Appeals rulings. Judge Becker wrote:

> "[W]hat really clinches this case for me is the Secretary's posture toward judicial declarations that displease SSA. . . . It thus appears that, when the Secretary has taken a final position on a disputed

> question, he will continue to adhere to, and require compliance with, those views even after a Court of Appeals has resolved the issue against him. Under these circumstances, exhaustion of administrative remedies becomes a mere exercise in futility, both for the claimant and for the court. It makes far more sense to allow the claimants to litigate the case and, if successful, to obtain a decree enforceable via contempt proceedings." Petn. for Cert. App., at 25a-26a.

As to the state defendants, Judge Becker disagreed with the majority that 28 U.S.C. §1331 was an available basis for jurisdiction, but he maintained that jurisdiction over the state defendants was proper under the mandamus statute.

The Secretary filed a petition for certiorari in this Court on March 27, 1984. Respondents received an extenions of time in which to file until June 1, 1984.

ARGUMENT

On May 14, 1984, the Court handed down a full opinion in No. 82-1772, Heckler v. Ringer. That opinion furnishes authoritative guidance on a number of questions of law regarding original federal court jurisdiction over cases concerning the Social Security Act and the relationship of §405(g) of that Act to 28 U.S.C. §§1331 and 1361. The judgment below in this case is fully consistent with Ringer, and to the extent that the Court of Appeals' analysis is inconsistent with that in Ringer, this case will have no precedential effect.

Although similar questions might have been presented by this case, the Court need not repeat the effort it expended in deciding Ringer. None of the issues presented by this case and not addressed by Ringer merit independent review.

1. Ringer decided the important issues in this case.

(a) Prior to the Court's recent decision in Ringer, substantial confusion existed on a number of issues regarding, first, the source of federal court jurisdiction over claims arising under the Social Security Act, and, second, the considerations which would support a waiver of the exhaustion requirement in §405(g) of the Social Security Act for cases in which jurisdiction is founded on that provision.[12]

Ringer provides authoritative guidance on both of these questions. As far as the source of jurisdiction is concerned, it holds clearly that, for Medicare claims, §405(g) of the Social Security Act (as incorporated by §1395ff of the Medicare Act) is the exclusive basis for original federal court jurisdiction over any claim that can be said to "arise under" the Medicare Act. Ringer, slip op. 9-12. By implication, that holding extends to the Social Security program itself, and §405(g)--in the case of Title XVI claims, as incorporated by

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12. See, e.g., National Association of Home Health Agencies v. Schweiker, 690 F.2d 932, 936-942 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 1193 (1983) (and cases cited therein) (discussing splits among circuits).

§1383(e)--must be regarded as the basis of original federal court jurisdiction over claims against the Secretary "arising under" the Social Security Act. The Court of Appeals in this case addressed this precise question and unanimously reached the conclusion now dictated by Ringer. Petn. for Cert. App. 7a-9a; id., at 16a-18a (Becker, J., concurring).[13]

Ringer also clarifies the conditions under which a court may take jurisdiction of a case based on §405(g) despite the plaintiffs' failure to exhaust the full range of administrative remedies made available by the Social Security Administration. As developed in Weinberger v. Salfi, 422 U.S. 749, 763-764 (1975), and in Mathews v. Eldridge, 424 U.S. 319, 328 (1976), §405(g)'s exhaustion requirement is not "purely 'jurisdictional' in the sense that it cannot be waived." 424

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13. Respondents also maintain that, even after Ringer, jurisdiction in this case could be maintained under 28 U.S.C. §1331. Unlike the claims in Ringer, respondents' claims based on the Constitution are not "inextricably intertwined" with their claims for benefits, and they do not seek a remedy that precludes the Secretary from denying their benefits. See Ringer, slip op., at 10-11. Many of the cases on which respondents rely, see nn. 3-10 supra, are interpretations of the Due Process Clause rather than the Social Security Act; in addition, respondents have claims under the separation of powers doctrine, see n. 25, infra. It is not at all clear that respondents' claims "arise under" the Social Security Act rather than the Constitution, or that Congress should be deemed to have denied (in §405(h)) the federal courts jurisdiction over a class of constitutional claims related to the Social Security Act for which §405(g) does not provide a meaningful alternative remedy. See Bush v. Lucas, 103 S.Ct. 2404, 2411-2412 (1983); Leedom v. Kyne, 358 U.S. 184, 190 (1958).

U.S., at 328.[14] Rather, the exhaustion requirement can be waived, either by the Secretary herself when "no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond [her] power to confer," id. at 330, as in Salfi and Heckler v. Day, supra or, with proper deference to the Secretary's position, by the Court itself, as in Eldridge, id., at 330-332. Both Eldridge and Ringer emphasize the practical nature of a court's decision whether to waive the exhaustion requirement over the Secretary's objection, which must be based on "the nature of the claims being asserted and the consequences of deferment of judicial review." Id., at 331 n.11.

The Eldridge Court based its waiver of the exhaustion requirement on its determinations that the claim presented by the plaintiff in that case was "entirely collateral to a substantive claim of entitlement" and that he had raised "at least a colorable claim" that in the absence of interim judicial relief he would suffer irreparable injury. Ringer reaffirms the adequacy of those criteria for judicial waiver,

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14. The non-waivable jurisdictional element of § 405(g) is presentment of a claim for beneifts to the Secretary. Salfi, supra, 422 U.S., at 764; Eldridge, supra, 424 U.S., at 328. Insofar as the "presentment" requirement is concerned, the named respondents are in the same position as the respondent in Eldridge, and the District Court's class certification order incorporates the presentment requirement, see p. 2, supra. See also Ellison v. Califano, 546 F.2d 1162, 1164 (5th Cir. 1977); Wilson v. Edelman, 542 F.2d 1260, 1270-71 (7th Cir. 1976).

slip op., at 14-15, but it also addresses a third factor, futility, id., at 1516.[15] In Ringer, "the exhaustion of administrative remedies [was] in no sense futile" for the plaintiffs, id., at 16, and therefore the Court refused to affirm a judicial waiver based exclusively on futility considerations. Yet Ringer's discussion of futility confirms what had been implicit in Salfi and Eldridge, and what had been the consistent position of the Courts of Appeals after Eldridge, that, with proper deference to the Secretary, a court may impose a judicial waiver on futility grounds.[16]

The analysis in Ringer is consistent with the existing case law in the Third Circuit, as represented by the decision below and by Liberty Alliance for the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977). As is especially evident in Judge Becker's careful concurring opinion, see Petn. for Cert. App., at 21a-27a, the decision below represents a straightforward application of the three-factor anlaysis developed in Eldridge

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15. The traditional consideration of the futility of preserving additional remedies is not expressly addressed in Eldridge, but it is implicit in the Eldridge analysis. See 424 U.S., at 330 ("It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.") The "collateral" claims element of the Eldridge analysis forms a subset of general futility considerations. The more "collateral" a claim, the less likely the Secretary is to consider it on its merits in the context of an administrative system designed for other purposes.

16. See, e.g., Liberty Alliance for the Blind, supra; Smith v. Schweiker, 709 F.2d 777, 780 (2d Cir. 1983); Jones v. Califano, 576 F.2d 12, 17-19 (2d Cir. 1978); De Lao v. Califano, 560 F.2d 1384, 1388 (9th Cir. 1977).

and Ringer with respect to the decision to waive the exhaustion requirement.

A comparison between this case and Ringer is instructive. First, the plaintiffs in Ringer in essence sought a declaration that a specific (and expensive) surgical procedure, designed not to effect a permanent cure but merely to relieve symptoms, was "reasonable and necessary" within the meaning of the Medicare Act. Far from being "collateral" to a basic claim for benefits under the Medicare Act, the relief requested went to the heart of a substantive, policy-laden determination committed by law to the discretion of the Secretary. In contrast, the plaintiffs in this case seek declaratory and injunctive relief solely as to the adjudicative methods used to determine whether they continue to be medically disabled within the meaning of the Social Security Act. Their principal claims concern four specific evidentiary standards promulgated by the Secretary that have, in cases involving individual claims, been found contrary to law by the Court of Appeals for the Third Circuit and by other federal courts of appeals.[17] These judicial interpretations--which have not been appealed by the Secretary to this Court[18]--constitute authoritative determinations that application of such standards

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17. See notes 3-10 supra and accompanying text. In contrast, the issues in Ringer had never been authoritatively adjudicated by the federal courts.

18. In his opinion granting a stay in Heckler v. Lopez, 104 S.Ct. 10, 12 (1983), Justice Rehnquist (sitting as Circuit Justice) noted that it was unlikely that the Court would grant certiorari on these and related issues.

is not appropriately within the discretion of the Secretary, and that the standards are contrary to the statutes and Constitution of the United States. These evidentiary standards are essentially collateral to the basic determination of medical disability that the Social Security Act entrusts to the Secretary,[19] and, although deference should ordinarily be accorded the procedures promulgated by the Secretary, see Heckler v. Campbell, 103 S.Ct. 1952, 1957 (1983), that deference should end with a final judicial determination that the procedures are contrary to law.

With regard to the irreparable injury consideration, the plaintiffs in Ringer had received the benefit of the surgical procedure at issue, and the claims which they sought to bring in federal court concerned compensability only.[20] Clearly, they could not establish even a "colorable" claim that

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19. The Secretary cites Smith v. Schweiker, 709 F.2d 777, 780-781 (2d Cir. 1983), for the proposition that respondents' claims are not collateral to their substantive claims for benefits. See Petn. for Cert. 16. In Smith, the Second Circuit held that a "mechanical improvement" claim similar to respondents' was not "collateral" to the plaintiffs' claims for benefits. Smith does not address claims similar to the other claims raised by respondents, nor does the incidental conflict between the opinion below and Smith change the fact that both the Second and Third Circuits follow the basic analysis in Liberty Alliance for the Blind, supra. See Jones v. Califano, 576 F.2d 12, 19 & n. 11 (2d Cir. 1978).

20. One of the named plaintiffs in Ringer, Freeman Ringer himself, had not had the benefits of the surgical procedure at issue. The Court, however, treated his claim separately and found that jurisdiction was barred on the basis of his failure to satisfy the non-waivable "presentment" requirement. Slip op., at 21; see n. 14, supra.

they would suffer irreparable injury from being required to exhaust their administrative remedies. By contrast, the plaintiffs in this case, many of whom suffer severe psychiatric disabilities, face continuing, non-monetary injury when they are subjected to unlawful disability review procedures. Although current regulations permit disability recipients to continue to receive benefits (subject to recoupment by the Secretary) pending final administrative disposition of their cases,[21] and although many recipients undoubtedly are found to remain disabled in the review process, even under unlawful procedures, the concrete threat of unfair termination and deprivation of benefits causes stress and, in many cases, deterioration of existing medical conditions.[22] Many Title

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21. Title XVI beneficiaries do not lose their disability benefits until after disposition of their administrative appeal by a federal Administrative Law Judge. 20 C.F.R. §416.1336(b). For Title II claims, Congress has enacted temporary legislation permitting persons whose benefits are terminated at the state level to receive interim benefits pending appeal to a federal Administrative Law Judge, subject to recoupment if the termination of benefits is affirmed. The authorization to pay interim benefits expires in June 1984, and it applies only to persons whose claims arose or were pending an administrative review on or after January 12, 1983, and before December 7, 1983. Pub. L. No. 97-455, §2, 96 Stat. 2498 (1982); Pub. L. No. 98-118, §2, 97 Stat. 803 (1983).

22. The interim harm caused by the mass review proceedings is documented extensively in several sets of congressional reports. See generally Oversight Hearings, supra; Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program: Report by the Chairman of the House Select Committee on Aging, 97th Cong., 2d Sess. (Comm. Print October 1982); 128 Cong. Rec. S7448-S7449 (daily ed. June 24, 1982) (statement of Sen. Cohen). In addition, several of the named respondents are disabled by severe psychiatric conditions which have deteriorated under the stress of responding to fundamentally unfair review procedures.

II beneficiaries may not be eligible for free legal representation and are forced to retain private counsel to pursue their claims, usually for a contingent fee of up to 25% of the retroactive benefits intended to make them whole. The "colorable" claim of irreparable injury in Eldridge was functionally identical to that of the plaintiffs in this case, see 424 U.S., at 331, and the Courts of Appeals have repeatedly held that similar claims met the Eldridge requirement.[23]

As in Ringer (although to different effect), the futility consideration is paramount in this case. In Ringer, the Court found that, far from being futile, resort to the administrative process would most likely provide the plaintiffs precisely the relief they sought. Slip op., at 15-16. That is far from true for the plaintiffs in this case. As emphasized by Judge Becker, the Secretary "has taken a fixed and final position on the claims at issue" in this case. Petn. for Cert. App., at 24a. As in Eldridge, it would be "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient." 424 U.S., at 330. Furthermore, the Social Security Administration review system is designed to focus on questions of substantive entitlement to benefits. Precisely because respondents' claims are collateral to the question whether any of them is in fact disabled means that

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23. See, e.g., Jones v. Califano, supra, 576 F.2d at 20-21; Wilson v. Edelman, 542 F.2d 1260, 1270-71 (7th Cir. 1976).

they do not have an opportunity to raise such claims within the administrative review system. It would be enormously wasteful for thousands of administrative law judges and the Appeals Council to consider the legality of the Secretary's system in each of thousands of individual cases. Their basic focus and expertise is, as it should be, with accurate determination of difficult fact questions such as individuals' health, disability, ability to perform their past work, or residual functional capacity. Full exhaustion of respondents' administrative remedies would be objectively futile insofar as their procedural claims are concerned, even though any number of them might ultimately prevail in defending their right to benefits (albeit at considerable human cost).

(b) As Eldridge emphasizes, federal courts should ordinarily defer to the Secretary, who is responsible for the overall efficiency of the Social Security system, in determining whether exhaustion of administrative remedies would be so meaningless as to justify a waiver of the requirement in §405(g). See 424 U.S., at 330. The Court of Appeals in this case recognized its duty to defer to the Secretary. See Petn. for Cert. App., at 25a-26a (Becker, J., concurring). However, the Secretary's unprecedented program of "nonacquiescence" in the Court of Appeals rulings which form the basis for respondents' claims makes deference inappropriate in this

case.[24] The Secretary may not agree with such rulings but they are, at present, the law. The Secretary may have concluded that few of the thousands of disability benefits recipients to whom the illegal procedures are applied will have the "security, awareness, tenacity, and ability" to prosecute an appeal, see Goldberg v. Kelly, 397 U.S. 254, 269 n.16 (1970), and that therefore nonacquiescence will serve her budgetary or political purposes. The courts need not, however, defer to such cynical--and probably unconstitutional[25]--calculations. "The doctrine of separation of powers was adopted by the Convention of 1789, not to promote efficiency, but to preclude the exercise of arbitrary power." Meyer v. United States, 272 U.S. 52, 93 (1926) (Brandeis, J., dissenting).

Furthermore, the Secretary's course of action has substantial detrimental effects on the federal courts themselves. As long as the Secretary enforces illegally stringent review procedures throughout the administrative

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24. On the Secretary's nonacquiescence policies, see H.R. Rep. No. 98-25, 98th Cong., 1st Sess. (1983); Oversight Hearings, supra; Pear, "U.S. Flouts Courts in Determination of Benefit Claims," N.Y. Times, May 13, 1984, at 1.

25. Respondents believe that the Secretary's nonacquiescence policy is unconstitutuional, both as a violation of separation of powers and her art. II, §3 duty to take care that the laws be faithfully executed, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); United States v. Nixon, 418 U.S. 683, 704- 708 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, (1952), and of the Due Process Clause of the Fifth Amendment, see Bell v. Burson, 402 U.S. 535, 541-542 (1971).

system, and relief from those procedures is available only by subsequent application to a federal court, the federal judicial system will face a flood of petitions for review of Social Security Administration determinations. Furthermore, since district courts in the Third Circuit follow Third Circuit precedents that the Secretary refuses to apply, recipients often find themselves caught in an endless "loop" of terminations, judicial reinstatements, new eligibility reviews, and terminations. Many persons whose benefits are terminated will not bring federal court actions, but many--perhaps thousands in each district--do. In effect, the Secretary has served her own budgetary needs by shifting part of the cost of the Social Security system to the federal judicial system. The federal courts need not assist her in this project. From the standpoint of the federal judicial system, judicial waiver of the exhaustion requirement in this case is necessary to avoid the burden of a substantial increase in the level of disability cases.[26]

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26. The Third Circuit recently began an opinion by stating, "[T]his is the fifth time since the beginning of the year that we have had to remand because of violation of Cotter [v. Harris, supra]." Wier v. Heckler, No. 83-5433 (May 14, 1984), slip op., at 3. The court then examined national statistics regarding disability cases, which showed a 400% increase in district court filings since the institution of the policies at issue in this case. See id., at 4; 1983

[Footnote 26 continued on next page]

(c) For the foregoing reasons, the judgment below is a faithful application of the analysis established by Eldridge and clarified by Ringer. The Court of Appeals' determination that jurisdiction exists in this case, as opposed to Ringer, rests entirely on considerations which are not themselves worthy of Supreme Court review. The only aspect of this case which is not adequately elaborated by Eldridge and Ringer is the effect of the Secretary's nonacquiescence policy on the deference due to the Secretary's determinations with regard to the futility consideration. For the Court to grant review of this case on that basis would enmesh it in a transitory political dispute and would allow the Secretary to derive an unseemly advantage from her policy. Furthermore, respondents

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[Footnote 26 continued from previous page]

Annual Report of the Director of the Administrative Office of the United States Courts 140. The court observed,

> The problem is not so much the increase in filings and the consequent burden imposed on already-taxed federal judicial resources. Rather, what troubles us more is the fact that the Secretary so often appears to have wrongfully withheld benefits or to have processed a claim so that it is impossible to tell whether he correctly denied benefits. In the Eastern District of Pennsylvania, for example, over the past two and one quarter years, the Secretary has prevailed at the district court level only 31 percent of the time. This figure is extraordinarily low, not only because there is no other genre of cases with which we are familiar that is reversed or remanded by the federal courts at such a rate, but also because the Secretary does not even have to show that she is "right" but only that there is "substantial evidence" to support her position.

Wier v. Heckler, supra, slip op. at 4-5 (footnotes omitted).

note that the Secretary's nonacquiescence policy appears to be in flux, and congressional action may well be forthcoming.[27] Given the likelihood of further administrative or legislative changes in the policies at issue in this case before the Court could hear the case and reach a final decision, it would seem unwise to grant review to resolve the issues posed by the nonacquiescence policy.

2. None of the other issues raised by the Secretary merits review.

In addition to the central issues involving the Ringer-Eldridge-Salfi interpretation of §405(g)-(h), the Secretary's petition raises three additional issues, none of which independently merits Supreme Court review.

(a) The Secretary invokes Bob Jones University v. United States, 103 S.Ct. 2017 (1983), and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-379 (1982), in arguing that Congress should be deemed to have ratified the Secretary's position with regard to §405(g). The "ratification by silence" doctrine by no means supports the

27. On April 13, 1984, the Secretary announced a limited moratorium on continued disability investigation reviews in anticipation of forthcoming legislation. See Washington Weekly, April 13, 1984, at 57. See also 130 Cong. Rec. S4475-76 (daily ed. April 12, 1984)(colloquy among Senators Dole, Long and Cohen) (describing agreement to report new Social Security disability legislation out of the Senate Finance Committee).

Secretary's position. This case exhibits nothing approaching the clear pattern of rejections of specific, directly relevant bills present in Bob Jones. Furthermore, during the legislative revisions of the Social Security Act in recent years, Court of Appeals decisions such as Liberty Alliance for the Blind, supra, and Jones v. Califano, 576 F.2d 12, 19-21 (2d Cir. 1978), furnished the prevailing interpretation of §405(g) for cases such as this, in which the Secretary has taken a final position on procedural issues affecting disabilty reviews. It is likely that Congress intended to leave in place that interpretation of §405(g). See Bob Jones University, 103 S.Ct., at 2032-2034. In any event, the dispute over this point did not merit the Court's attention in Ringer, to which it was as relevant as in this case, and does not require further refinement of the Ringer analysis now.

(b) The Secretary questions whether the Court of Appeals was correct in finding jurisdiction under 28 U.S.C. §1331 over state officials who make initial disability decisions pursuant to federal standards. Respondents have included the state defendants in this case only for the purpose of obtaining complete relief at all levels of the administrative process. The claims against the state officials relate solely to their administration of unlawful standards at the Secretary's behest. Respondents do not assert that they could maintain a separate action against the state defendants independent of their claims against the federal defendants, and

the Court of Appeals so qualified its holding. Petn. for Cert. App., at 7a.

In his concurring opinion below, Judge Becker disagreed with the majority's conclusion that jurisdiction over the state defendants could be founded on §1331, but he determined that the mandamus statute, 28 U.S.C. §1361, furnished an adequate basis for such jurisdiction. Regardless of the merits of the majority's position on §1331, §1361 provides jurisdiction over the state defendants in this case. In administering a federal program, under federal standards and subject to federal control, they are in the position of an "agency" of the United States for purposes of mandamus.[28] In Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981), on which the Secretary relies, Judge Friendly accepted this position for cases in which the claims against federal and state officials are identical. Id., at 76 n.9; see id., at 78-82 (and cases cited therein) (holding that §405(h) does not bar mandamus jurisdiction).[29] If, as respondents maintain, both federal

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28. The District Court found that the state defendants are the agents of the Federal government for purposes of the making initial disability determinations, Petn. for Cert. App., at 45a, and the Secretary repeats the characterization in her petition, Petn. for Cert. 18. See Chaudoin v. Atkinson, 494 F. 2d 1323 (3d Cir. 1974) (state official subject to mandamus in administering federal program).

29. This Court has repeatedly reserved decision on the availability of mandamus in cases such as this. See Heckler v. Ringer, supra, slip op. at 12-13; Califano v. Yamasaki, 442 U.S. 682, 698 (1979); Mathews v. Eldridge, supra, 424 U.S., at 332 n. 12.

and state defendants continue to administer disability reviews in a manner contrary to controlling federal court decisions, and respondents should be excused from the exhaustion requirement of §405(g) under Ringer,[30] then the mandamus statute provides jurisdiction over the state defendants.

(c) The Secretary attacks the Court of Appeals' statement that, for purposes of reviewing a dismissal for want of jurisdiction, it would accept as true respondents' allegations that the Secretary had taken a final position on the procedural standards at issue in this case. See Petn. for Cert. 17; Petn. for Cert. App., at 9a. The Secretary's standards are all plainly set forth in regulations and formal rulings issued by her and disseminated by the Social Security Administration, and their existence and content are not subject to dispute. Thus, the Secretary's fears of further complicated factfinding at the District Court level are unfounded. The doctrine of judicial waiver set forth in Ringer and Eldridge necessarily implies that the District Court will potentially face questions of fact regarding the extent of exhaustion, possible futility, and the relationship of plaintiffs' claims to their underlying claims for benefits. Presumably such

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30. Ringer holds that exhaustion of remedies requirements apply to the federal mandamus statute. Slip op., at 13. The availability of mandamus jurisdiction in this case thus turns on the same considerations relating to exhaustion under §405(g) discussed above; no separate issues worthy of review are presented.

questions will be resolved the way all preliminary questions of jurisdictional fact are resolved.

3. The procedural posture of this case makes effective Supreme Court review difficult.

The District Court entered its original order dismissing respondents' complaint as well as its order certifying respondents' class without argument on the record, any substantial refinement on the record of respondents' claims, or any exploration of the need to define subclasses of plaintiffs with respect to certain claims. The Court of Appeals rendered a similarly broad-stroked decision--in essence, it reversed the District Court on the critical §405(g) issue for abuse of discretion in failing to take account of controlling Third Circuit precedent. No relief has been granted to respondents. As a result, the case as it appears before this Court is almost purely a matter of initial pleadings, and neither lower court has devoted any attention to the basic issues of who may be entitled to exactly what kind of relief. By way of comparison, see the opinion of the Ninth Circuit denying a stay in Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984), in which such issues were addressed on an appropriate record.

If the Supreme Court grants review at this stage of the case, it may well be required, without any factual record, to hypothesize refinements of the generalized allegations and

requests for relief in respondents' complaint in order to determine whether any part of the complaint states a cause of action over which a federal court may take jurisdiction. See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust, 51 U.S.L.W. 4945 (1983). District courts, rather than this Court or the Courts of Appeals, are the appropriate forum for the basic development of a case. Although jurisdictional decisions are generally made without extensive fact finding at the District Court level, a higher level of factual development in cases such as this may be required for meaningful Supreme Court review. Furthermore, the relief actually granted by a District Court, if any is in fact granted, may illuminate difficult jurisdictional issues at the Supreme Court level.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 83-1593

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the petition for a writ of certiorari, we suggested that the Court might wish to hold the petition and dispose of it in light of its decision in *Heckler* v. *Ringer*, No. 82-1772 (which was then under submission), if the decision in *Ringer* sufficiently addressed the issues presented in this case. In the alternative, we suggested that the petition for a writ of certiorari should be granted. See Pet. 12, 19. The Court rendered its decision in *Ringer* on May 14, 1984. That decision does directly address the issues presented in this case, and indeed respondents concede (Br. in Opp. 10, 11) that *Ringer* furnishes "authoritative guidance" on a number of questions regarding federal court jurisdiction over cases arising under the Social Security Act. In these circumstances, we submit that the appropriate disposition is for the Court to grant the petition in this case, vacate the

judgment of the court of appeals, and remand for further consideration in light of the decision in *Ringer*.[1]

Although respondents agree that *Ringer* affords authoritative guidance, they nonetheless argue that certiorari should be denied. In their view, the decision below is consistent with *Ringer* and, to the extent it is not, it will have no precedential effect. For these reasons, they conclude, this case does not merit "independent review." See Pet. 10-11. Respondents are wrong in contending that the decision below is consistent with *Ringer*. See pages 3-7, *infra*. But however that may be, respondents miss the point. We are not asking the Court to grant plenary or "independent review," and thus to determine in the first instance whether the court of appeals' decision is consistent with *Ringer*. We are simply asking the Court to vacate the judgment below and give the Third Circuit an opportunity to reconsider its own holding in light of the subsequent decision in *Ringer*. That is a routine step for the Court to take, and indeed, in another Social Security case raising jurisdictional issues, the Court already has vacated the judgment of the court of appeals and remanded for further consideration in light of *Ringer*. See *Heckler* v. *Starnes*, No. 83-1149 (June 4, 1984).

Respondents have offered no reason why the Court should not do the same here. In fact, they do not even discuss this option. That course nevertheless is plainly warranted. There is no reason why further proceedings should be required in the lower courts in this massive class action — which respondents allege in their complaint involves

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[1]The House of Representatives passed disability amendments (H.R. 3755) on March 27, 1984 (130 Cong. Rec. H1992-H1993 (daily ed.)), and the Senate passed a different version of H.R. 3755 on May 22, 1984 (130 Cong. Rec. S6241 (daily ed.)). The bill now is awaiting consideration in Conference.

more than 250,000 potential class members (C.A. App. 5; see Pet. 6-7) and which accordingly could cause a substantial disruption in the administrative adjudication of claims in Pennsylvania — until the court of appeals has had an opportunity to reconsider its jurisdictional ruling in light of *Ringer*.

2. Because we do not ask the Court to grant plenary review, we shall only briefly answer respondents' attempts to defend the judgment below. The Third Circuit's decision and respondents' submission simply cannot be reconciled with *Ringer*.

First, the Court held in *Ringer* that 42 U.S.C. 405(h) bars the exercise of federal question jurisdiction under 28 U.S.C. 1331 over claims arising under the Social Security Act (slip op. 11-12, 17-23). Yet the court of appeals in this case held that the district court did have jurisdiction under 28 U.S.C. 1331 insofar as the action was brought against the state officials (Pet. App. 5a-7a), and respondents argue (Br. in Opp. 12 n.13) that the district court also had jurisdiction even as against the federal defendants under 28 U.S.C. 1331. Second, the Court held in *Ringer* that, even assuming 42 U.S.C. 405(h) does not altogether foreclose mandamus jurisdiction in Social Security cases, the exercise of mandamus jurisdiction is in any event barred where the plaintiff has an adequate remedy in an action for judicial review under 42 U.S.C. (Supp. V) 405(g) (slip op. 12-13). Yet the court of appeals in the instant case held that the district court could exercise mandamus jurisdiction under 28 U.S.C. 1361 even though respondents have an adequate remedy under 42 U.S.C. (Supp. V) 405(g) (Pet. App. 11a-12a).

Third, the Court held in *Ringer* that the district court did not have jurisdiction under 42 U.S.C. (Supp. V) 405(g) because the claimants had not exhausted their administrative remedies, since the Secretary had not waived the

exhaustion requirement and the case did not fall within the narrow exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976) (slip op. 13-16). Yet the court of appeals in this case held that the district court did have jurisdiction under 42 U.S.C. (Supp. V) 405(g) even though respondents likewise had not exhausted their administrative remedies (Pet. App. 7a-11a).

Respondents do not attempt to defend the Third Circuit's finding of jurisdiction under 42 U.S.C. (Supp. V) 405(g) on the ground that the Secretary herself has waived exhaustion, as in *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975); *Mathews* v. *Diaz*, 426 U.S. 67, 76-77 (1976); or *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 6 n.14. See also *Heckler* v. *Ringer*, slip op. 14-15 & n.11. Respondents argue (Br. in Opp. 14-19), however, that a court may "waive" the exhaustion requirement based on its own finding of futility, even though the Secretary has not done so. But this Court explicitly held in *Salfi* that a court may *not* excuse exhaustion based on a judicial finding of futility, as the district court there had done (422 U.S. at 766), and the Court so held even though the issue the plaintiff sought to raise in *Salfi* was the constitutionality of a provision of the Social Security Act that was beyond the competence of the Secretary to decide. A fortiori, that aspect of *Salfi* applies in this case, in which respondents challenge what they term (Br. in Opp. 15, 16) the "evidentiary standards" applied to their cases at the administrative level, since those standards are within the Secretary's competence to decide. See 42 U.S.C. 405(a); *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-8; *Heckler* v. *Ringer*, slip op. 15 n.11.

Contrary to respondents' contention (Br. in Opp. 14), the Court in *Ringer* did not overrule the holding in *Salfi* that a court may not substitute its judgment for that of the Secretary on the question of the futility of exhaustion; the Court

explicitly held that "the Court of Appeals erred in second guessing the Secretary's judgment" (slip op. 15). Moreover, respondents concede (Br. in Opp. 7-8 n.11) that 11 of the 16 named plaintiffs who had not exhausted their administrative remedies when this suit was filed succeeded in having their benefits reinstated at the administrative level. Therefore here, as in *Ringer* (slip op. 15-16), exhaustion is "in no sense futile" for the members of the respondent class. Even the dissenting Justices in *Ringer* agreed that full exhaustion is required where, as here, payment of the claim for benefits is not foreclosed at the adminstrative level (slip op. 2, 12-13 (Stevens, J., dissenting)).

Respondents also contend (Br. in Opp. 15-16) that the issues they seek to raise fall within the narrow exception in *Mathews* v. *Eldridge* excusing exhaustion for "wholly collateral" issues where there is a colorable claim of injury that could not be remedied by a retroactive award of benefits. See also *Heckler* v. *Ringer*, slip op. 14-15. That contention is frivolous. The "evidentiary standards" to be employed in adjudicating a claim for benefits, which respondents challenge here, are no more collateral to the claims for benefits than were the various "procedural" issues involved in *Ringer*. Nor have respondents made a colorable showing that their alleged injury could not be adequately remedied through a retroactive award of benefits. In *Eldridge*, the plaintiff's collateral argument was that he had a constitutional right to a hearing before his benefits were cut off, and the distinct injury that would result from the asserted constitutional violation — a termination of benefits without a prior hearing — could not be remedied by a retroactive award of benefits at a later date. Here, in contrast, respondents do not contend that they will suffer any distinct injury as a result of the Secretary's ruling on what they label "collateral" issues. Respondents simply contend that they may suffer hardship as a result of an erroneous denial of

benefits on the merits while they await a possible reversal on administrative or judicial review. That contention presumably could be made in any Social Security disability case in which benefits are denied at the initial determination stage. Yet in deliberately applying the established multi-level administrative review procedure to disability cases (see Pet. 12-15), Congress obviously determined that the usual statutory remedy for an erroneous denial of benefits at the initial determination stage — a retroactive award of benefits at a later stage of administrative or judicial review — would be an adequate remedy under the disability program as well. As this Court recently observed, Congress presumably concluded that cases of individual hardship pending administrative review must be balanced against the potential for premature judicial intervention into an administrative system under which millions of claims are adjudicated each year. *Heckler* v. *Ringer*, slip op. 23-24. And where Congress has wished to alleviate individual hardship, it has authorized the payment of interim benefits pending administrative review (see Pet. 4 & n.1); it has not authorized circumvention of that review, as respondents urge.

Finally, respondents appear to argue (Br. in Opp. 19-23) that established exhaustion and jurisdictional rules should be abandoned because, they assert, the Secretary has not acquiesced in Third Circuit precedent concerning the "evidentiary standards" they challenge. We disagree with the notion that a challenge to the Secretary's alleged failure to follow a particular appellate decision — which is essentially an assertion of nonmutual collateral estoppel against the government of the kind the Court rejected in *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984) — is not subject to the usual exhaustion and jurisdictional rules. But in any event, respondents did not allege in their complaint in this case that the Secretary has not followed Third Circuit precedent on the particular "evidentiary standards"

involved (C.A. App. 2-29). Nor is the Third Circuit's ruling excusing exhaustion under 42 U.S.C. (Supp. V) 405(g) and finding mandamus jurisdiction under 28 U.S.C. 1361 limited to situations in which the Secretary allegedly has not acquiesced in circuit precedent; it is sufficient under the court of appeals' holding if a plaintiff alleges that the Secretary has formed a "fixed position" on a particular issue involved in a claim for benefits, whatever the courts might have said on that issue (Pet. App. 7a-12a).

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984).

Respectfully submitted.

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No. 83-1593

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1593

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services and the other petitioners, files this supplemental brief to discuss the effect on this case of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*, which was signed by the President on October 9, 1984. We have lodged a copy of that Act with the Clerk of the Court and reproduced Section 2 of the Act as an appendix to this brief. As we shall explain below, the 1984 Act requires that the claims of all of the class members be remanded to the Secretary for new administrative proceedings and that the complaint in this action be dismissed.

A

Respondents allege that certain practices of the Secretary and the Pennsylvania Disability Determination Bureau in reviewing the continuing eligibility of persons receiving disability benefits under Title II and Title XVI of the Social Security Act violate that Act and the Due Process Clause. Specifically, they allege that petitioners:

(1) fail to show, as a condition to terminating benefits, that the claimant's medical condition has improved; (2) fail to give presumptive effect to the prior determination of disability; (3) terminate benefits in the absence of fully developed evidence from all treating personnel and without giving appropriate weight to such evidence; and (4) terminate benefits without sufficiently considering such factors as medical equivalence, combination of impairments, pain, and residual functional capacity (C.A. App. 25-27; Pet. App. 39a-40a). The district court certified a class of plaintiffs consisting of all disability beneficiaries under Title II and Title XVI of the Act in Pennsylvania "whose benefits have been terminated or are threatened with termination and who have presented claims for continued disability" (C.A. App. 40).

The district court dismissed the complaint for lack of subject matter jurisdiction under 42 U.S.C. (Supp. V) 405(g) (Pet. App. 39a-45a), but the court of appeals reversed and remanded for further proceedings (Pet. App. 1a-34a). The court of appeals held that respondents were not required to exhaust their administrative remedies before bringing an action under 42 U.S.C. (Supp. V) 405(g) with regard to issues on which the Secretary had allegedly taken a "fixed" position (Pet. App. 7a-11a), and that jurisdiction also was available over the federal defendants under 28 U.S.C. 1361 and over the state defendants under 28 U.S.C. 1331, notwithstanding the preclusion of review in 42 U.S.C. 405(h) (Pet. App. 12a-13a, 5a-7a).

As we explained in our reply brief (at 3-7), the court of appeals' decision is flatly inconsistent with this Court's decision in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), and with the Court's prior precedents that were reaffirmed in that decision. We therefore submitted in the reply brief (at 7) that the case should be remanded to the court of appeals for further consideration in light of *Ringer*. Congress's recent action, however, now requires a different disposition.

B

The Social Security Disability Benefits Reform Act of 1984 specifically addresses most of the substantive issues respondents raised in district court, and it also directs a particular disposition of this case as a procedural matter.

1. a. One of the principal purposes of the new legislation is to resolve the controversy over the so-called "medical improvement" issue. That issue has generated widespread litigation, often in the form of massive class actions, that has substantially disrupted the orderly administration of the Social Security disability program.

The "medical improvement" issue concerns the evidentiary standards that the Secretary must utilize in determining whether a person receiving disability benefits continues to be disabled. Prior to the passage of the 1984 amendments, the Social Security Act itself did not address that question,[1] although it was settled that the claimant bore the burden of proving by medical evidence that he met the statutory standard of eligibility when his status was reviewed. See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976). Pursuant to her authority under 42 U.S.C. 405(a) to promulgate evidentiary and other rules and procedures (see *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-8), the Secretary determined that the inquiry when reviewing a recipient's continuing eligibility should focus on whether his current condition satisfied applicable standards, rather than on whether his condition had changed. It was not the Secretary's position, however, that the prior finding of disability was

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[1] The legislative history of the 1984 Act shows that Congress recognized that the Social Security Act previously did not impose special standards for continuing disability reviews. See, *e.g.*, H.R. Rep. 98-618, 98th Cong., 2d Sess. 11 (1984) ("the criteria for termination of benefits as a result of review were left unstated in the law" and "SSA has therefore had wide discretion to apply whatever standards it deemed appropriate"); S. Rep. 98-466, 98th Cong., 2d Sess. 7-8 (1984); 130 Cong. Rec. H9827 (daily ed. Sept. 19, 1984) (Joint Explanatory Statement of the Committee of Conference); *id.* at S11453 (remarks of Sen. Dole).

irrelevant, because it might well shed light on the claimant's current condition.

Many claimants challenged the Secretary's approach. Like respondents in this case, they typically argued that under the Social Security Act even as it existed prior to the 1984 amendments, if an individual was once found to be disabled he was entitled to a presumption that he continued to be disabled when his eligibility was subject to review, thereby effectively shifting the burden to the Secretary in all disability review cases to produce evidence that the individual was no longer disabled. The courts of appeals had taken varying approaches to the issue,[2] and the Solicitor General was considering a request that this Court resolve the matter.

b. In Section 2 of the 1984 Act, Pub. L. No. 98-460, 98 Stat. 1794, Congress amended Sections 223(f) and 1614(a) of the Social Security Act (42 U.S.C. (Supp. V) 423(f); 42 U.S.C. (& Supp. V) 1382c) to prescribe detailed standards for the termination of disability benefits. Under the amendments, a recipient of disability benefits whose case is reviewed may be determined not to be entitled to benefits on the basis of a finding that his impairment is not disabling only if that finding is supported by: (1) substantial evidence that there has been medical improvement in the individual's impairment and that he is now able to engage in substantial gainful activity; (2) new medical evidence and a new assessment of the individual's residual functional capacity demon-

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[2] Some courts had held that the claimant should be afforded a presumption of continuing disability. See, *e.g.*, *Patti* v. *Schweiker*, 669 F.2d 582, 586-587 (9th Cir. 1982); *Dotson* v. *Schweiker*, 719 F.2d 80, 82 (4th Cir. 1983); *Haynes* v. *Secretary of HHS*, 734 F.2d 284, 288 (6th Cir. 1984); *DeLeon* v. *Secretary of HHS*, 734 F.2d 930, 936-937 (2d Cir. 1984); *Rush* v. *Secretary of HHS*, 738 F.2d 909, 914-916 (8th Cir. 1984). But see *Gist* v. *Secretary of HHS*, 736 F.2d 352, 355-357 (6th Cir. 1984). The Third Circuit had rejected such a presumption and held that the claimant bore the initial burden of establishing that there had not been improvement in his medical condition. See *Kuzmin* v. *Schweiker*, 714 F.2d 1233, 1237 (3d Cir. 1983).

strating that, although his condition has not improved medically, he has undergone vocational therapy or is the beneficiary of advances in medical or vocational therapy or technology and is now able to engage in substantial gainful activity; (3) substantial evidence based on new or improved diagnostic techniques demonstrating that the individual's impairment is not as disabling as it previously was considered to be and that he is now able to engage in substantial gainful activity; or (4) substantial evidence that the prior determination of disability was in error.[3] The amendments to Sections 223(f) and 1614(a) expressly provide, however, that there is no presumption of continuing disability and that the determination whether the person is currently disabled is to be made on a neutral basis after considering all evidence available in the file.

2. Congress also concluded when it passed the 1984 Act that it was essential to the effective, uniform, and fair administration of the disability program that the widespread and disruptive litigation over the appropriate standards for terminating benefits should cease immediately and that all pending cases should instead be considered under the new statutory standards. To implement this determination, Congress specified in detail the manner in which the new statutory standards would be applied to pending cases. There are essentially three categories of cases affected:

Cases Pending on Administrative Review. The new medical improvement standards apply to (i) all cessation determinations made by the Secretary on or after the date of enactment of the 1984 amendments, and (ii) all cessation determinations with respect to which a final de-

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[3] The amendments to Sections 223(f) and 1614(a) also provide that benefits may be terminated if the prior determination that the individual was disabled was fraudulently obtained or if the individual is engaged in substantial gainful activity, cannot be located, fails to cooperate in the review of his entitlement, or fails to follow a prescribed treatment that could be expected to restore his ability to engage in substantial gainful activity.

cision of the Secretary had not been made on the date of enactment but with respect to which a request for administrative review is made in conformity with the time limits, exhaustion requirements, and other provisions of 42 U.S.C. (& Supp. V) 405 and regulations of the Secretary. § 2(d)(2)(A) and (B), 98 Stat. 1797.

Individual Cases Pending on Judicial Review. The new standards apply to all cessation determinations with respect to which a request for judicial review was pending on September 19, 1984 (the date of the Conference Committee's action) and which involve individual litigants or *named* plaintiffs in a class action pending on that date. § 2(d)(2)(C) 98 Stat. 1797.[4] Any cases in this category that are ones "relating to medical improvement"[5] must be remanded by the court to the Secretary for review under the new standards. § 2(d)(2), 98 Stat. 1798 (final paragraph). The individual may request payment of interim benefits until the initial redetermination by the Secretary. § 2(e), 98 Stat. 1798.

Class Actions. The new standards apply to any unnamed member of a pending class action "relating to medical improvement" (see note 5, *supra*) if the class was certified on or before September 19, 1984, and if the individual class member was found not to be entitled to disability benefits on the ground that his impairment had ceased, did not exist, or was not disabling. § 2(d)(3),

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[4] The new standards also apply in cases in which the Secretary had rendered a final decision within the 60-day period prior to the date of enactment but the claimant had not yet sought judicial review under 42 U.S.C. (Supp. V) 405(g), but only if the claimant seeks judicial review in a timely fashion (*i.e.*, within 60 days of the final decision) after the date of enactment. § 2(d)(2)(D), 98 Stat. 1797.

[5] The term "action relating to medical improvement" is defined to mean a suit raising the issue whether an individual should not have had his entitlement to disability benefits terminated "without consideration of whether there has been medical improvement in the condition of such individual * * * since the time of a prior determination that the individual was under a disability." § 2(d)(6), 98 Stat. 1798.

98 Stat. 1798.[6] In the case of any such individual, "the court shall remand such case to the Secretary." *Ibid.* The Secretary is then required to notify each individual by certified mail that, within 120 days of receipt of the notice, he may request that his case be reviewed under the new standards. The individual also may request payment of interim benefits pending the initial redetermination. § 2(e), 98 Stat. 1798.

Section 2(d)(3), 98 Stat. 1798, permits unnamed class members in pending certified class actions relating to medical improvement an opportunity to have their cases reviewed under the new statutory standards whether or not they had exhausted their administrative remedies or satisfied the 60-day filing requirement in 42 U.S.C. (Supp. V) 405(g). Congress chose to grant this special relief to members of certified classes "even where they may not have pursued their appeal rights in accordance with section 205 and the Secretary's regulations" because of the need to "resolve the controversy over the medical improvement issue in the courts" and because many class members "may have formed reasonable expectations from the fact of certification that they would receive further review of the case." 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984) (remarks of Sen. Dole).[7] See also *id.* at H9828 (Joint Explanatory Statement of the Committee of Conference). But Congress did not thereby sanction a

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[6] Section 2(d)(5) of the 1984 Act, 98 Stat. 1798, provides that no class in a class action relating to medical improvement may be certified after September 19, 1984 if the class action seeks judicial review of a decision terminating entitlement made by the Secretary prior to September 19, 1984. This prevents any future class action litigation on the medical improvement issue under prior law. See 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984) (remarks of Sen. Dole); S. Rep. 98-466, 98th Cong., 2d Sess. 16-17 (1984).

[7] Under the Senate bill, the only unnamed class members whose claims would have been preserved and remanded to the Secretary were those who had fully exhausted their administrative remedies and for whom judicial review was sought (in the form of the class

general exception to the exhaustion and time-limit requirements in 42 U.S.C. (Supp. V) 405(g).[8]

C

The named and unnamed members of the class in this case are entitled to relief under the 1984 Act. This case is one "relating to medical improvement" within the

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action) within 60 days of the Secretary's final decision, as required by 42 U.S.C. 405(g). See 130 Cong. Rec. S6202-S6203 (daily ed. May 22, 1984). The Senate Report explained that insofar as the bill would have barred reopening of claims where the claimant had not sought further administrative review or judicial review within 60 days, it merely restated existing law that "precludes judicial review of administrative denials of claims that the claimants themselves allowed to become final." S. Rep. 98-466, *supra*, at 14, citing *Califano* v. *Sanders*, 430 U.S. 99 (1977); see also S. Rep. 98-466, *supra*, at 15. Similarly, relying upon 42 U.S.C. 405(g), the Secretary's regulations, and this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), the report explained that under existing law, a claimant could obtain judicial review on a claim for benefits that involved the medical improvement issue only if he first exhausted his administrative remedies through the Appeals Council stage. S. Rep. 98-466, *supra*, at 15.

The effective date provision of the House bill did not address the effect of the bill on members of certified classes in pending class actions. See 130 Cong. Rec. H1992 (daily ed. Mar. 27, 1984). The Conference Committee revised the bill to grant relief to all members of certified classes.

[8] The Joint Explanatory Statement cautioned that the granting of remand relief to all members of certified classes does not reflect a view "as to whether those classes would otherwise have been found to be properly certified in accordance with the exhaustion and finality requirements of section 205 of the Social Security Act." 130 Cong. Rec. H9828 (daily ed. Sept. 19, 1984). Chairman Dole, the floor manager in the Senate, stressed that the time limits, exhaustion requirements, and other provisions of Section 205 of the Social Security Act and regulations of the Secretary "are critical to the orderly administration of the program" and that the omission of those requirements in the medical improvement section of this special legislation "should not be interpreted as detracting from their broad applicability." *Id.* at S11454. See also S. Rep. 98-466, *supra*, at 15.

meaning of Section 2(d) of the 1984 Act, since the first two of the four issues respondents raise in the complaint pertain directly to the medical improvement question (C.A. App. 25-26). See page 2, *supra*.[9] The cases of the individual named respondents therefore should be remanded to the Secretary to be reviewed pursuant to Section 2(d)(2)(C) of the 1984 Act. In addition, the class in this case was certified on May 4, 1982 (C.A. App. 40), well before the September 19, 1984 cut-off date for members of certified classes to be covered by the standards in the 1984 Act. The cases of the unnamed class members therefore should be remanded to the Secretary

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[9] The class in this case was not defined to include only those individuals whose claims for benefits actually involved the medical improvement issue. It was defined to include all Pennsylvania residents whose disability benefits have been terminated or are threatened with termination (C.A. App. 40). This class definition presumably is attributable to the fact that, as we have noted (see page 2, *supra*), respondents raise issues other than medical improvement. The claims of the individual class members in this case that raise these other issues are covered by the special statutory remand procedure even if they do not raise the medical improvement issue, because the class action is one "relating to medical improvement." All that is necessary in order for an individual member of a class in such a case to be included in a remand is that he was found not entitled to receive benefits because his "impairment * * * has ceased, does not exist, or is not disabling" (§ 2(d)(3)(A), 98 Stat. 1798) — *i.e.*, that his benefits were terminated because of a determination relating to his impairment, and not, for example, because of fraud or because he had returned to work. The additional issues raised in the complaint in this case (see page 2, *supra*) fall within the covered category. Moreover, many of the additional issues respondents raise are themselves addressed by 1984 Act. See § 3, 98 Stat. 1799 (evaluation of pain), § 4, 98 Stat. 1800 (multiple impairments), § 9, 98 Stat. 1804 (evidence from the treating physician). If an individual class member elects after remand to have his case reviewed, the standards in the 1984 Act with regard to these issues also would apply in that review.

In other class actions, however, where the class or a subclass is confined to persons whose individual claims actually raise the medical improvement issue, only such persons would be entitled to the remand relief.

for further proceedings pursuant to Section 2(d)(3) of the 1984 Act.[10]

The 1984 Act contemplates no further role for any court after an individual case or the case of an unnamed member of a certified class has been remanded to the Secretary. This conclusion is evident from a number of features of the special procedures Congress has prescribed in Section 2(d) of the 1984 Act.

The individual cases of named class members must be remanded by the appropriate court to the Secretary, who then will proceed after remand to review them pursuant to the new statutory standards. The court has no discretion in the matter. The same is true with regard to cases of the unnamed class members. It is also significant that it is the individual cases that are to be remanded, not the class as such, and it is only after remand that the Secretary is to notify each individual of his right to request a new administrative review. This notification and review in turn will be undertaken pursuant to uniform procedures that the Secretary will apply to all such individual claims. Moreover, Section 2(d)(4) of the 1984 Act expressly provides that the decision of the Secretary following review "shall be regarded as a new decision * * * of the Secretary." That new decision "supersedes" the prior determination that was pending on judicial review and is "subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security Act and regulations issued by the Secretary in conformity with such section." § 2(d)(4), 98 Stat. 1798.

Because the 1984 Act plainly contemplates that new proceedings will be commenced in each individual case after remand, the individual cases cannot at the same

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[10] Of course, in the case of any named or unnamed class members who already have been found to be entitled to continue to receive benefits even under the Secretary's interpretation of prior law, there will be no occasion for the Secretary actually to reopen and redetermine their claims after remand.

time be subject to the continuing jurisdiction of the court in the class action. Any such continuing exercise of authority by the courts would be inconsistent with the clear intent of Congress to end the disruption and lack of uniformity in the administration of the Social Security disability program that had resulted from class actions in various jurisdictions on the medical improvement issue. Compare *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 12. Accordingly, the complaint in the instant case should be dismissed when the claims of the individual class members are remanded to the Secretary.

CONCLUSION

For the foregoing reasons, we suggest that the Court enter the following order in this case:

> The petition for a writ of certiorari is granted, the judgment of the court of appeals is vacated, and the case is remanded to the court of appeals to be remanded to the district court with instructions to: (i) remand the cases of the named respondents to the Secretary for review pursuant to Section 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (ii) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to Section 2(d)(3) of that Act; and (iii) dismiss the complaint.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1984

APPENDIX

Section 2 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, provides:

STANDARD OF REVIEW FOR TERMINATION OF DISABILITY BENEFITS AND PERIODS OF DISABILITY

SEC. 2. (a) Section 223(f) of the Social Security Act is amended to read as follows:

Standard of Review for Termination of Disability Benefits

"(f) A recipient of benefits under this title or title XVIII based on the disability of any individual may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by—

"(1) substantial evidence which demonstrates that—

"(A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

"(B)(i) the individual is now able to engage in substantial gainful activity, or

"(ii) if the individual is a widow or surviving divorced wife under section 202(e) or a widower or surviving divorced husband under section 202(f), the severity of his or her impairment or impairments is no longer deemed, under regulations prescribed by the Secretary, sufficient to preclude the individual from engaging in gainful activity; or

"(2) substantial evidence which—

"(A) consists of new medical evidence and (in a case to which clause (ii) (II) does not apply) a new assessment of the individual's residual functional capacity, and demonstrates that—

"(i) although the individual has not improved medically, he or she is nonetheless a beneficiary of advances in medical or vocational therapy or technology (related to the individual's ability to work), and

"(ii) (I) the individual is now able to engage in substantial gainful activity, or

"(II) if the individual is a widow or surviving divorced wife under section 202(e) or a widower or surviving divorced husband under section 202(f), the severity of his or her impairment or impairments is no longer deemed under regulations prescribed by the Secretary sufficient to preclude the individual from engaging in gainful activity, or

"(B) demonstrates that—

"(i) although the individual has not improved medically, he or she has undergone vocational therapy (related to the individual's ability to work), and

"(ii) the requirements of subclause (I) or (II) of subparagraph (A) (ii) are met; or

"(3) substantial evidence which demonstrates that, as determined on the basis of new or improved diagnostic techniques or evaluations, the

individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision that he or she was under a disability or continued to be under a disability, and that therefore—

"(A) the individual is able to engage in substantial gainful activity, or

"(B) if the individual is a widow or surviving divorced wife under section 202(e) or a widower or surviving divorced husband under section 202(f), the severity of his or her impairment or impairments is not deemed under regulations prescribed by the Secretary sufficient to preclude the individual from engaging in gainful activity; or

"(4) substantial evidence (which may be evidence on the record at the time any prior determination of the entitlement to benefits based on disability was made, or newly obtained evidence which relates to that determination) which demonstrates that a prior determination was in error.

Nothing in this subsection shall be construed to require a determination that a recipient of benefits under this title or title XVIII based on an individual's disability is entitled to such benefits if the prior determination was fraudulently obtained or if the individual is engaged in substantial gainful activity (or gainful activity in the case of a widow, surviving divorced wife, widower, or surviving divorced husband), cannot be located, or fails, without good cause, to cooperate in a review of the entitlement to such benefits or to follow prescribed treatment which would be expected to restore his or her ability to engage in substantial gainful activity (or gainful activity in the case of a widow, surviving divorced

wife, widower, or surviving divorced husband). Any determination under this section shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by the Secretary. Any determination made under this section shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled. For purposes of this subsection, a benefit under this title is based on an individual's disability if it is a disability insurance benefit, a child's, widow's, or widower's insurance benefit based on disability, or a mother's or father's insurance benefit based on the disability of the mother's or father's child who has attained age 16.".

(b) Section 216(i)(2)(D) of such Act is amended by adding at the end thereof the following: "The provisions set forth in section 223(f) with respect to determinations of whether entitlement to benefits under this title or title XVIII based on the disability of any individual is terminated (on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling) shall apply in the same manner and to the same extent with respect to determinations of whether a period of disability has ended (on the basis of a finding that the physical or mental impairment on the basis of which the finding of disability was made has ceased, does not exist, or is not disabling)."

(c) Section 1614(a) of such Act is amended by adding at the end thereof the following new paragraph:

"(5) A recipient of benefits based on disability under this title may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by—

"(A) substantial evidence which demonstrates that—

"(i) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

"(ii) the individual is now able to engage in substantial gainful activity; or

"(B) substantial evidence (except in the case of an individual eligible to receive benefits under section 1619) which—

"(i) consists of new medical evidence and a new assessment of the individual's residual functional capacity, and demonstrates that—

"(I) although the individual has not improved medically, he or she is nonetheless a beneficiary of advances in medical or vocational therapy or technology (related to the individual's ability to work), and

"(II) the individual is now able to engage in substantial gainful activity, or

"(ii) demonstrates that—

"(I) although the individual has not improved medically, he or she has

undergone vocational therapy (related to the individual's ability to work), and

"(II) the individual is now able to engage in substantial gainful activity; or

"(C) substantial evidence which demonstrates that, as determined on the basis of new or improved diagnostic techniques or evaluations, the individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision that he or she was under a disability or continued to be under a disability, and that therefore the individual is able to engage in substantial gainful activity; or

"(D) substantial evidence (which may be evidence on the record at the time any prior determination of the entitlement to benefits based on disability was made, or newly obtained evidence which relates to the determination) which demonstrates that a prior determination was in error.

Nothing in this paragraph shall be construed to require a determination that an individual receiving benefits based on disability under this title is entitled to such benefits if the prior determination was fraudulently obtained or if the individual is engaged in substantial gainful activity, cannot be located, or fails, without good cause, to cooperate in a review of his or her entitlement or to follow prescribed treatment which would be expected to restore his or her ability to engage in substantial gainful activity. Any determination under this paragraph shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by

the Secretary. Any determination made under this paragraph shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled.".

(d)(1) The amendments made by this section shall apply only as provided in this subsection.

(2) The amendments made by this section shall apply to—

(A) determinations made by the Secretary on or after the date of enactment of this Act;

(B) determinations with respect to which a final decision of the Secretary has not yet been made as of the date of the enactment of this Act and with respect to which a request for administrative review is made in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security Act and regulations of the Secretary;

(C) determinations with respect to which a request for judicial review was pending on September 19, 1984, and which involve an individual litigant or a member of a class in a class action who is identified by name in such pending action on such date; and

(D) determinations with respect to which a timely request for judicial review is or has been made by an individual litigant of a final decision of the Secretary made within 60 days prior to the date of the enactment of this Act.

In the case of determinations described in subparagraphs (C) and (D) in actions relating to medical improvement, the court shall remand such cases to the Secretary for review in accordance with the provisions of the Social Security Act as amended by this section.

(3) In the case of a recipient of benefits under title II, XVI, or XVIII of the Social Security Act—

(A) who has been determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits were provided has ceased, does not exist, or is not disabling, and

(B) who was a member of a class certified on or before September 19, 1984, in a class action relating to medical improvement pending on September 19, 1984, but was not identified by name as a member of the class on such date,

the court shall remand such case to the Secretary. The Secretary shall notify such individual by certified mail that he may request a review of the determination described in subparagraph (A) based on the provisions of this section and the provisions of the Social Security Act as amended by this section. Such notification shall specify that the individual must request such review within 120 days after the date on which such notification is received. If such request is made in a timely manner, the Secretary shall make a review of the determination described in subparagraph (A) in accordance with the provisions of this section and the provisions of the Social Security Act as amended by this section. The amendments made by this section shall apply with respect to such review, and the determination described in subparagraph (A) (and any redetermination resulting from such review) shall be subject to further administrative and judicial review, only if such request is made in a timely manner.

(4) The decision by the Secretary on a case remanded by a court pursuant to this subsection shall be regarded as a new decision on the individual's claim for benefits, which supersedes the final decision of the Secretary. The new decision shall be subject

to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security Act and regulations issued by the Secretary in conformity with such section.

(5) No class in a class action relating to medical improvement may be certified after September 19, 1984, if the class action seeks judicial review of a decision terminating entitlement (or a period of disability) made by the Secretary of Health and Human Services prior to September 19, 1984.

(6) For purposes of this subsection, the term "action relating to medical improvement" means an action raising the issue of whether an individual who has had his entitlement to benefits under title II, XVI, or XVIII of the Social Security Act based on disability terminated (or period of disability ended) should not have had such entitlement terminated (or period of disability ended) without consideration of whether there has been medical improvement in the condition of such individual (or another individual on whose disability such entitlement is based) since the time of a prior determination that the individual was under a disability.

(e) Any individual whose case is remanded to the Secretary pursuant to subsection (d) or whose request for a review is made in a timely manner pursuant to subsection (d), may elect, in accordance with section 223(g) or 1631(a)(7) of the Social Security Act, to have payments made beginning with the month in which he makes such election, and ending as under such section 223(g) or 1631(a)(7). Notwithstanding such section 223(g) or 1631(a)(7), such payments (if elected)—

(1) shall be made at least until an initial redetermination is made by the Secretary; and

(2) shall begin with the payment for the month in which such individual makes such election.

(f) In the case of any individual who is found to be under a disability after a review required under this section, such individual shall be entitled to retroactive benefits beginning with benefits payable for the first month to which the most recent termination of benefits applied.

(g) The Secretary of Health and Human Services shall prescribe regulations necessary to implement the amendments made by this section not later than 180 days after the date of the enactment of this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS

v.

FRANK KUEHNER, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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In the Supreme Court of the United States

October Term, 1984

NO. 83-1593

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 22.6 of the Rules of this Court, respondents file this supplemental brief to respond to the supplemental brief filed by the Solicitor General on behalf of petitioners, in which the Solicitor General addressed the effect of the recently enacted Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 ("1984 Reform Act"), and requested that the Court vacate the judgment below and remand the case with certain instructions.

This is a class action filed on April 29, 1982, in the United States District Court for the Eastern District of Pennsylvania, against the Secretary of Health and Human Services (the "Secretary"), the Commissioner of Social Security, and two state officials responsible for administering Social Security disability claims under contract with the Secretary. The named plaintiffs represent a class consisting of all disability beneficiaries under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§401 et seq., 1381 et seq., who reside in Pennsylvania, who have presented claims for continuing benefits, and who have been, are, or will be terminated from the disability benefit program. The case raises questions whether the Secretary has refused to follow controlling Third Circuit precedent in disability review proceedings by (among other things) determining that individual recipients are no longer disabled without finding that their medical condition has improved, without according substantial weight to the reports of treating physicians, and without evaluating pain, the combined effect of multiple impairments, or non-medical vocational factors.

The District Court dismissed respondents' complaint for lack of subject matter jurisdiction. It held that respondents could not obtain jurisdiction because not all class members had exhausted their administrative remedies. The Court of Appeals for the Third Circuit reversed, holding

that the District Court had failed to follow (or even to acknowledge) controlling precedent in the Third Circuit as to both the judicial review provisions of the Social Security Act, 42 U.S.C. §§ 405(g), 1383(c)(3), and the mandamus statute, 28 U.S.C. § 1361. Applying these precedents, the Court of Appeals found jurisdiction proper under either statute.

Respondents concur with the Solicitor General's evaluation that the 1984 Reform Act affects the proper disposition of this case by the Court. The 1984 Reform Act represents congressional rejection of a course of action by the Secretary since 1981 that has resulted in a rash of litigation and widespread criticism of the Social Security Administration. Without a single dissenting vote, Congress granted extraordinary relief to all named and unnamed members of classes certified prior to and pending on September 19, 1984, in "actions relating to medical improvement," see §2(d)(2), specified new standards for evaluations of medical improvement (§2(a)), pain (§3(a)), and multiple impairments (§4), and imposed a moratorium on eligibility reviews under the Secretary's current criteria for evaluating mental impairments (§5(b)).

With the 1984 Reform Act, Congress acted on behalf of those terminated and specifically resolved the question presented to this Court by the Solicitor General: whether members of this class were barred from further relief on account of their failure to exhaust fully their administrative

remedies under the Social Security Act. Senator Dole, who represented the Administration's interests in negotiations concerning final passage of the Act, stated: "[Section 2(d)] permit[s] all class members of certified class actions to seek review of their cases under the medical improvement standard establishment [sic] by this act, even when they may not have pursued their appeal rights in accordance with section [405] and the Secretary's regulations." 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984).[1]

Accordingly, no useful purpose would now be served by reconsideration of the judgment below in light of Heckler v. Ringer, No. 82-1772 (May 14, 1984), or by plenary Supreme Court proceedings on the question presented in the petition for certoriari. Respondents agree on the need for swift effectuation of the congressional mandate in the 1984 Reform Act.

Respondents respectfully differ, however, with the form of order suggested by the Solicitor General. See Supplemental Brief for Petitioners, at 11. Not only is there no need for this Court to order dismissal of the complaint, as requested by the Solicitor General, but such an order would bring with it the possibility of misinterpretation

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1. Congress' reasons for granting this special relief seem remarkably close to those expressed by Judge Becker in his concurring opinion in the Court of Appeals. Essentially, the extraordinary burden on the courts and individual recipients created by the Secretary's "non-acquiescence" policy made strict application of the general exhaustion requirements unfair. See 130 Cong. Rec. S11457 (daily ed. Sept. 19, 1984) (remarks of Sen. Levin); id. S11459-S11460 (remarks of Sen. Sasser); id. S11461 (remarks of Sen. Cohen); id. H9836 (remarks of Rep. Pickle); id. H9837-H9838 (remarks of Rep. Roybal).

and confusion in the District Court and in all other federal courts in which cases affected by the 1984 Reform Act are pending. Furthermore, the proposed instructions embody several disputed interpretations of the 1984 Reform Act, interpretations supported by only a few paragraphs of conclusory argument in the Solicitor General's brief. See id. at 9 n.9, 10-11. Rather than entering the order suggested by the Solicitor General, the Court should simply deny certiorari or, in the alternative, do no more than remand for further proceedings consistent with the 1984 Reform Act.[2]

The Supreme Court's practice of summarily granting a writ of certiorari, vacating the judgment below, and remanding with instructions is a powerful incident of its certiorari jurisdiction, and one that has received practically no comment in the Court's opinions or in the law review articles and treatises that have described the Court's practices. With a few, unexplained exceptions,[3] cases in which the Court has summarily instructed lower federal courts to dismiss a complaint fall exclusively into two categories: (1) cases which have become moot or have abated pending

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2. If the Court is determined to interpret the Act de novo in the Supreme Court, it should request that the parties brief the 1984 Act issues fully, thereby also providing the parties to other class actions affected by the Act notice of the Court's intent and an opportunity to present their views as amici.

3. E.g., Moore v. Black Panther Party, 458 U.S. 118 (1982) (no explanation); Washington v. United States, 357 U.S. 348 (1958) ("because of the insufficiency of the evidence").

disposition of a petition, see, e.g., United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950); United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission, 274 U.S. 106, 11-112 (1927), or (2) cases in which a decision by the Supreme Court subsequent to the proceedings below has made clear that the plaintiffs had no right to relief, see, e.g., United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (disallowing interlocutory appeals of a motion to dismiss an indictment on vindictive prosecution grounds); Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion) (complaint raised nonjusticiable political question); Grant v. United States, 369 U.S. 401 (1962) (following De Bella v. United States, 369 U.S. 121 (1962), which held that pre-indictment orders granting or denying the suppression of evidence were not appealable).

In this case, the 1984 Reform Act does not fully moot the controversy between respondents and petitioners, and the Solicitor General has implicitly conceded that a simple Munsingwear order is inappropriate.[4] At the very least, further proceedings in the District Court will clearly be necessary to give temporal definition to the broad class certified by the District Court, see p. 2, supra, to identify unnamed class members and to locate them, and to make certain the Secretary has provided adequate notice to the class. For

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4. Where a change in the law obviously moots the controversy between the parties, of course, the Court may instruct the lower courts to dismiss the complaint, as in a straight "Munsingwear" case. See, e.g., United States v. Hamburg-Amerikanische Gesellschaft, 239 U.S. 466 (1915). Cf. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (withdrawal of jurisdiction).

some class members, the question will arise whether the Secretary should render a new decision or apply the "mental impairments" moratorium in §5 of the 1984 Reform Act. A number of respondents' claims have not been addressed by the new statute. See pp. 2-3, supra. Thus, while some of the specific issues raised in the proceedings below have been resolved by the 1984 Reform Act, at least some further proceedings must occur. In such cases of partial mootness, the Court has not ordered dismissal of the complaint. See, e.g., University of Texas v. Camenisch, 451 U.S. 390, 394 (1981).[5]

A change in statutory law while an appeal is pending presents different, although related, issues. In general, the Court has always considered itself bound to follow the new law, if it is applicable. See United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103, 109 (1801). The Court has three basic options in such a situation. It can make its own determination of the applicability and the effect of the new law, see, e.g., id.; Hines v. Davidowitz, 312 U.S. 52, 60 (1941). This may be done summarily or after

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5. In some cases of partial mootness, the Court has ordered dismissal of the complaint without prejudice to reinstitution of new proceedings to resolve the remaining issues. E.g., Alejandrino v. Quezon, 271 U.S. 528 (1926); United States v. Alaska S.S. Co., 253 U.S. 113 (1920); cf., O'Ryan v. Mills Novelty Co., 292 U.S. 609 (1934) (change in state law). If the Court adopts the Solicitor General's proposed order, it should modify the Order to specify that the case be discussed without prejudice.

argument specifically addressed to the change in law, see Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940). Second, it can determine whether the change in the law is relevant to the case before it, and, if so, remand for a determination by the lower courts as to the effect of the new law. See, e.g., Omaha National Bank v. Nebraskans for Independent Banking, 426 U.S. 310 (1976); Fusari v. Steinberg, 419 U.S. 379 (1975); Roth v. Delano, 338 U.S. 226, 231 (1949). Third, the Court can do nothing at all, provided that, given the procedural posture of the case, the parties remain able to address the change in the law in the lower courts.[6]

The choice among these three options depends upon the discretionary considerations that generally govern exercise of the Court's appellate jurisdiction. Two factors, however, predominate. First, the Court's goal has been "to make such disposition of the case as justice may at this time require." Watts, Watts & Co. v. Unione Austriaca, 284 U.S. 9, 21 (1918) (Brandeis, J.). A judgment in the lower court the substance or procedural effect of which is contrary to the new law must be vacated or reversed, even if it was correct when entered. Id.; Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941); Rafferty v. Smith, Bell & Co., 257 U.S. 226, 232 (1921). Therefore, by negative implication, certiorari may be denied if enforcement of the judgment below will lead to a result consistent with the new law. See Gulf, Col. & S.F. Ry. v. Dennis, 224 U.S. 503, 509 (1912).

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6. Because denials of certiorari are rarely explained, it is difficult to cite precedent for this theoretically obvious alternative.

Second, the Court must consider the quality of its decision, especially where the effect of the new law is not entirely clear, the lower courts have not had the opportunity to address the new law, and the Court has not had the advantage of briefing and argument on the issue. For that reason, although the Supreme Court clearly has the power to interpret new law de novo, it often declines to do so. With regard to changes in state law, the leading commentators on Supreme Court practice have observed:

> "The customary procedure of the Supreme Court . . . when its attention has been called to changes in state law supervening the judgment or decree under review, is to remand the cause for appropriate action by the state courts, a procedure which obviates the injustice which might occur if the Supreme Court closed its eyes to changes in state law, but which defers to the rule that questions of state law are primarily for the determination of state courts."

Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States, § 89, at 161 n.3 (R. Wolfson & P. Kurland eds. 1951). There is an equivalent (if less strong) policy favoring initial consideration of federal law by the lower federal courts. Without a proper record, a lower court interpretation, and the opportunity to consider the new law in the context of more than a single case, the Supreme Court generally refuses (and ought to refuse) to create a precedent that may not be fully informed. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 677-679 (1950) (remanding to lower court for consideration of new federal issues raised by Supreme Court opinion).

The interests of justice require nothing more in this case than a simple, non-precedential denial of certiorari. While a judgment that leads to an incorrect result under current law cannot stand, Gulf, Col. & S.F. Ry., supra, and the Court attempts to prevent an unreviewable judgment from "spawning any legal consequences," see Goldwater v. Carter, supra, at 1006 (plurality opinion), permitting the judgment of the Court of Appeals to stand in this case presents neither danger. The result of the Court of Appeals' judgment, which merely upheld a jurisdiction that now clearly exists, is perfectly consistent with the 1984 Reform Act. A denial of certiorari will have the simple effect of returning the case to the District Court, which has a clear duty to give effect to the 1984 Reform Act, and where petitioners have every opportunity to advance their construction of the Act. And the judgment below will have no general precedential value, given the uniqueness of the facts upon which it was rendered--facts which inspired Congress to grant extraordinary relief--and given the Supreme Court's subsequent restatement of the first principles of Social Security Act exhaustion in Ringer.

In contrast, the form of order suggested by the Solicitor General is likely to cause confusion, both in the District Court hearing this case and in other federal courts. The Solicitor General's proposed order--precisely because it

so resembles a Munsingwear order--may be misinterpreted as implying that the lower courts no longer have jurisdiction to resolve the issues necessary to effect the remand required by the 1984 Reform Act. Given the potential difficulty of fixing class membership in this and other cases, such a misinterpretation would produce havoc.[7]

With regard to the second discretionary factor, the Solicitor General's proposed order embodies several controversial interpretations of the 1984 Reform Act, which the Court should not adopt summarily.[8] When District Courts remand disability cases to the Secretary for a new determination of eligibility for benefits, the consistent practice, as reflected in the statute, has been for the courts to retain jurisdiction over the case until the administrative process has been completed. 42 U.S.C. §405(g); See, e.g., Zambrana v. Califano, 651 F.2d 842, 844 (2d Cir. 1981); Good v. Weinberger, 389 F.Supp. 350 (W.D. Pa. 1975).

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7. Furthermore, by vacating the Court of Appeals' judgment, the Supreme Court might cast doubt on respondents' entitlement to a 1984 Act remand, despite Congress' clear intent to provide such relief. Respondents' class claim was pending on September 19, 1984, only by reason of the Court of Appeals' judgment reversing the District Court's dismissal of the case. While vacating the Court of Appeals' judgment would not necessarily mean that respondents are not entitled to relief under the 1984 Act, it could be so interpreted.

8. For the Court to adopt the proposed order, it would necessarily have to adopt the Solicitor General's interpretation, and its decision would be binding precedent in every case affected by the Act. While a denial of certiorari has no precedential effect, see Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (opinion of Frankfurter, J.), a summary grant of certiorari and disposition of the appeal creates precedent.

Congress did not likely intend that entirely different procedures be applied to remands under the 1984 Reform Act. Furthermore, the Solicitor General seems to take the view that the Secretary alone should determine which persons are entitled to relief as unnamed class members and what steps should be taken if--for instance--a substantial number of certified letters cannot be delivered. Ordinarily, however, the District Court that certified the class would resolve such questions. It is also not clear that all members of this class and other classes whose benefits were denied on non-"medical improvement" grounds should be denied the opportunity to proceed in federal court, especially if (as, for instance, with regard to pain) the 1984 Reform Act's standards are less favorable than previously controlling law in a particular Circuit.[9]

Before adopting the Solicitor General's reading of the Act, with no record and no lower court consideration of the question, the Court should at least request further briefing addressed to this issue, or even hear argument on the question as in Carpenter. The circumstances of this case, however, do

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9. In such cases, the Solicitor General's suggestion that the 1984 Reform Act has withdrawn jurisdiction from the federal courts altogether without furnishing an equivalent remedy raises a serious question under the Due Process Clause. See generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). The problem is further complicated by the fact that the precise standards under the new Act will not be clear until the Secretary has completed the rulemaking required by the Act.

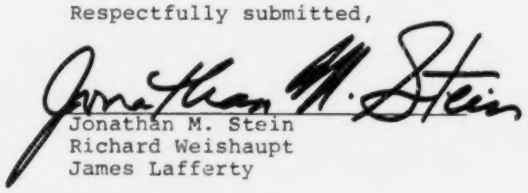
not require that this Court receive further briefs, hear argument, or even concern itself with the issues raised by the Act. Such issues, while presently of great importance to members of certified classes in Social Security Act disability cases, are strictly ephemeral in that they require technical construction of a single piece of special legislation, they will necessarily be resolved within the coming months by courts throughout the federal system, and they will not thereafter reoccur. In short, the questions now presented by this case do not require immediate resolution by the Supreme Court, nor would they be "certworthy" if presented on petition from a Court of Appeals.

Therefore, the Court should deny the writ of certiorari and leave first-instance interpretation of the 1984 Reform Act to the District Court. If, however, the Court determines that it must take some action, it should remand the case to the District Court "for further proceedings consistent with" the 1984 Reform Act, rather than adopting the Solicitor General's more directive proposal. Cf. Omaha National Bank, supra (remand "for reconsideration in light of" new statute). In no event should the Court accept the Solicitor General's invitation to create binding precedent on the merits of the 1984 Reform Act without requesting additional briefing from the parties on the precise procedural steps that the statute requires in the circumstances of this case.

Conclusion

Respondents respectfully suggest that the writ of certiorari be denied or, in the alternative, that the Court remand the case to the District Court "for proceedings consistent with the Social Security Disability Benefits Reform Act of 1984."

Respectfully submitted,



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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1984

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BRIEF FOR THE PETITIONERS IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

We submit this brief to reply to the arguments respondents have raised in their supplemental brief addressing the effect on this case of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*.

1. Respondents agree (Resp. Supp. Br. 3-4) that the 1984 Act controls this case and that the claims of the named and unnamed class members must be remanded to the Secretary for further administrative proceedings pursuant to the 1984 Act. But respondents nevertheless contend that this Court should provide for the district court on remand to retain jurisdiction over the case for the indefinite future in order to exercise continuing control over the Secretary's implementation of the 1984 Act and to resolve what they suggest may be an endless stream of issues that any of the thousands of

class members might seek to interject into this suit. Nothing could be more inconsistent with the clear congressional intent to end the massive litigation that has disrupted the disability program and to provide instead for the return of the cases of the class members to the Secretary so that she may interpret and apply the 1984 Act to these and all other claimants in a fair and uniform manner.

In contrast to the confusion respondents' approach would sow, the disposition we have suggested follows from a straightforward application of the mandatory terms of the 1984 Act. Respondents make no effort to answer our construction of the pertinent provisions of the text and legislative history of the 1984 Act. Indeed, respondents do not even discuss those materials, much less cite anything in them to support their proposal for open-ended litigation in the lower courts in this and numerous other cases. Nor do respondents indicate that they would have anything relevant to add in yet another round of briefing in this Court, which they offer as an alternative course (Resp. Supp. Br. 12-13). In these circumstances, we believe that the Court should enter an order requiring dismissal of the complaint after the cases of class members have been remanded to the Secretary. Such an order would provide guidance to the lower courts in the disposition of these medical improvement class actions and enable the Secretary to implement the 1984 Act with the uniformity and dispatch Congress intended.

2. Respondents maintain (Resp. Supp. Br. 6, 11, 12) that the district court should be permitted on remand to clarify the scope of the class and that our proposed order directing the district court to dismiss the complaint might foreclose that possibility. We agree with respondents that if there is uncertainty regarding the scope of the class — *e.g.*, the date after which the administrative decision on an individual's claim must have been rendered in order for the individual to

be included in the class — that question should be clarified by the district court on remand. But the order we have proposed for the Court to enter would not foreclose the district court from doing so; that order would direct the district court to dismiss the complaint only *after* it has remanded the cases of the named and unnamed class members to the Secretary for administrative proceedings pursuant to Sections 2(d)(2)(C) and 2(d)(3) of the 1984 Act. A clarification by the district court of the general scope of the class logically would be accomplished *before* that remand, so that the court could indicate what category of individuals is covered by the remand. To remove any possible ambiguity on this point, however, we suggest at the conclusion of this brief a modified version of the order we previously proposed. See page 8, *infra*.

3. Respondents further argue (Resp. Supp. Br. 6-7, 12) that the district court should not dismiss the complaint even after the cases of all named and unnamed class members have been remanded to the Secretary as required by the 1984 Act. Respondents contend that the district court should instead retain jurisdiction to identify unnamed class members and locate them, to direct the Secretary's sending of notices to them, and to determine what steps should be taken if the certified letter sent to a class member cannot be delivered. That is precisely the sort of continuing judicial intrusion into the Secretary's administration of the Social Security disability program that Congress intended to halt by substituting a special statutory remand and notification procedure to be implemented on a uniform basis by the Secretary for whatever varying procedures the district courts might otherwise have fashioned under Fed. R. Civ. P. 23.[1]

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[1]The clear intent of Congress to supplant the operation of Rule 23 in this setting is reflected as well in the prohibition in Section 2(d)(5) of the 1984 Act against the certification of any class in a class action relating to medical improvement after the September 19, 1984 cut-off date.

Although Congress defined the category of individuals entitled to request a reopening of their cases under the special statutory procedure in terms of whether they were unnamed class members in a certified class action, the identification and notification of these individuals and the reopening of their cases upon request is to take place outside of the context of the class action and the jurisdiction of the district court. Congress has assigned those responsibilities directly to the Secretary, and they are to be carried out only *after* the district court has remanded the cases to the Secretary, thereby effectively dissolving the class action in court. Judicial review then will be available only after the Secretary has issued a superseding decision on the individual's claim following the remand and the individual has fully exhausted his administrative remedies. § 2(d)(3) and (4).

For this reason, respondents plainly err in contending (Resp. Supp. Br. 6) that the district court in this and other class actions has the authority to monitor the Secretary's disposition of the claims of thousands of individuals affected by Section 2(d)(3) of the Act (cf. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 21-23) and that on-going proceedings will be required in district court for that purpose. To the contrary, the legislative history makes clear that this is purely an administrative task under the direction of the Secretary.[2]

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[2]See 130 Cong. Rec. H9828 ((daily ed.) Sept. 19, 1984) (Joint Explanatory Statement of the Committee of Conference) (emphasis added):

> The conferees recognize that there will be considerable *administrative* difficulty in identifying and notifying individuals who are eligible to have their cases redetermined as a result of their being unnamed members of class actions certified prior to September 19, 1984. Notwithstanding the *administrative* difficulty of this task, the conferees expect the *Secretary of Health and Human*

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4. Respondents also contend (Resp. Supp. Br. 7) that the district court should retain jurisdiction to resolve issues that might arise regarding other substantive provisions of the 1984 Act, such as whether class members who claim disability benefits on the basis of mental impairment are covered by the "moratorium" on review of mental impairment cases in Section 5 of the 1984 Act. Contrary to respondents' apparent view, however, the class action that was pending on September 19, 1984 with regard to particular issues arising under prior law is not an open forum for the airing and resolution of whatever issues might be raised by or on behalf of any of the thousands of individuals who happen to be members of the class. To the contrary, the proper interpretation and application of the new mental impairment provision in Section 5 (and of any other features of the 1984 Act or the Social Security Act generally) are to be determined by the Secretary in the first instance through rulemaking, instructions, and administrative adjudication. The mental impairment issue respondents seek to intrude into this case therefore can be raised by any class member in the course of further administrative proceedings after his case is remanded to the Secretary, if the individual requests that the prior decision denying his claim be reopened.[3] The

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Services to act expeditiously in notifying these individuals of the provisions of this act which are applicable to them.

There is no mention of a role for the various district courts in this process, which would undermine the overriding goals of expedition and uniformity. To the extent respondents are concerned that certain notices might be returned undelivered (Resp. Supp. Br. 12), we have been informed by the Department of Health and Human Services that it has established procedures for the administration of the Social Security program generally to address that problem.

[3]Because the court of appeals held that exhaustion of administrative remedies was not a prerequisite to an individual's being included in the class in this case, many members of the respondent class may still have live claims for continuing disability benefits pending before the Secretary in conformity with applicable procedural regulations. The cases of

district court in this and other cases cannot pretermit that process and circumvent the requirement of exhaustion of administrative remedies by purporting to resolve the mental impairment issue or any other issues in the context of the instant litigation, either prior to remanding the cases of named and unnamed class members to the Secretary pursuant to the 1984 Act or while those cases are pending before the Secretary after the remand.

5. Equally without merit is respondents' suggestion (Resp. Supp. Br. 12) that class members whose benefits were terminated for reasons unrelated to the "medical improvement" issue might be permitted to continue to litigate in district court the other issues that are presented in the complaint in this case — *e.g.*, the proper standards for evaluation of pain, multiple impairments, or evidence from the treating physician — instead of having their individual cases remanded to the Secretary. As we have explained (Pet. Supp. Br. 9 n.9), the 1984 Act requires that the cases of all individual class members be remanded to the Secretary because the overall class action is one relating to medical improvement. Moreover, under *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), and related decisions, this class action could not proceed on these other issues because the class members have not exhausted their administrative remedies as required by 42 U.S.C. 405(g) and implementing regulations. In the 1984 Act, Congress fashioned a narrow exception to the exhaustion requirement applicable only to

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those individuals will automatically be reviewed under the medical improvement standard and other provisions of the 1984 Act by virtue of Section 2(d)(2)(B) of that Act, without the need for them to be notified and to request reopening under Section 2(d)(3) as an unnamed member of the class action in court. The practical importance of Section 2(d)(3) is for unnamed class members who, unlike those just discussed, effectively abandoned their claims by not personally seeking further administrative review or judicial review within the 60 days allowed.

certified class actions involving the medical improvement issue. And even then Congress provided only for a special procedure for remand and administrative review of the individual's claim for benefits; it did not permit further litigation in court in contravention of the exhaustion requirement. Finally, the text and legislative history of the 1984 Act establish that in disability cases involving issues other than medical improvement, the exhaustion and 60-day time limit requirements of 42 U.S.C. 405(g) and the Secretary's regulations are fully applicable. See Pet. Supp. Br. 7-8 & nn. 7, 8.

In the course of exhausting administrative proceedings after the statutory remand, any individual respondent will be entitled to raise the other issues that were presented in the complaint in this class action, if those issues continue to have a bearing on his claim for benefits. The individual then would be entitled to judicial review after the Secretary has had an opportunity to interpret and apply the provisions of the 1984 Act and the Social Security Act and has entered a "new" and "superseding" final decision on the individual's claim for benefits. § 2(d)(4). Accordingly, contrary to respondents' contention (Resp. Supp. Br. 12), they will not "be denied the opportunity to proceed in federal court" with regard to the other issues they presented in the complaint if the complaint is dismissed. Each individual respondent will have unimpeded resort to federal court (including, if appropriate, in a class action) in the manner Congress intended under 42 U.S.C. 405(g), after full exhaustion of administrative remedies.[4]

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[4]Respondents' suggestion (Resp. Supp. Br. 12) that Congress might be barred from applying a new statutory provision on these other issues to pending cases if the provision is less favorable than the standard under the prior law of the circuit is frivolous. An individual citizen acquires no vested right under a statutory benefits program to have the rule in a particular circuit applied to his case, since that circuit's rule is

CONCLUSION

For the foregoing reasons and the additional reasons stated in our Supplemental Brief, we suggest that the Court enter the following order in this case:

> The petition for a writ of certiorari is granted, the judgment of the court of appeals is vacated, and the case is remanded to the court of appeals to be remanded to the district court with instructions to: (i) remand the cases of the named respondents to the Secretary for review pursuant to Section 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (ii) make any necessary clarifications in the definition and scope of the class; (iii) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to Section 2(d)(3) of that Act; and (iv) dismiss the complaint.

Respectfully submitted.

REX E. LEE
Solicitor General

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always subject to review in this Court. *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971). Moreover, even where, unlike here, prior law might have appeared settled on a given question, it is firmly established that Congress may provide for a change in the law to be applied to pending cases, especially in an area of "great national concerns," such as the Social Security program. See, *e.g.*, *Bradley* v. *Richmond School Board*, 416 U.S. 696, 712 (1974), quoting *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801). In any event, respondents' argument is plainly premature. Any member of the respondent class who ultimately proves to be disadvantaged by application of the new standards in the 1984 Act may raise this argument on judicial review following the statutory remand of his case to the Secretary and subsequent exhaustion of administrative remedies.